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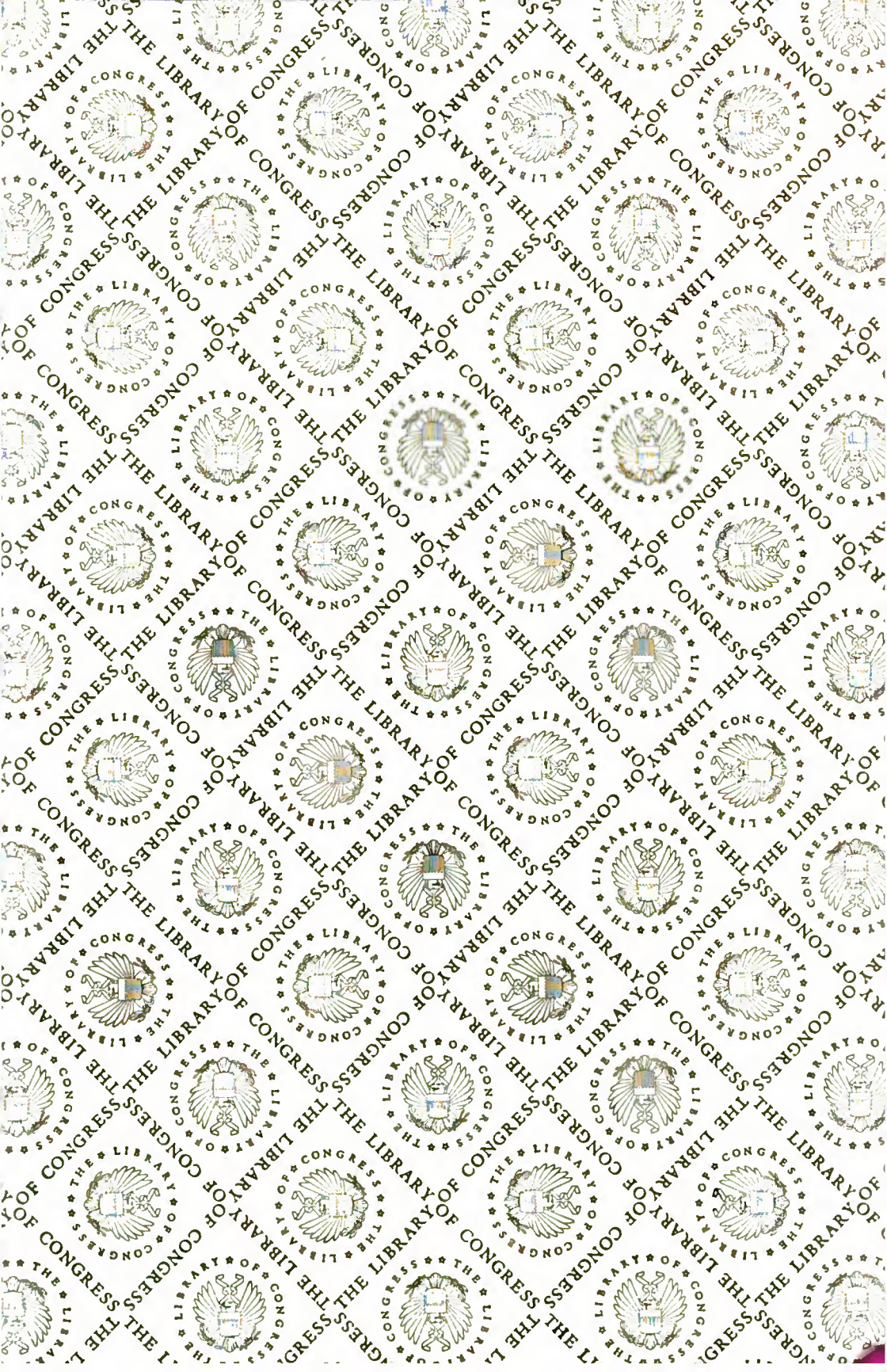
























*United States.*

# FLAG DESECRATION AMENDMENT TO THE CONSTITUTION

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HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

**H.J. Res. 79**

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE  
UNITED STATES AUTHORIZING THE CONGRESS AND THE STATES  
TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE  
UNITED STATES

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MAY 24, 1995

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**Serial No. 96**



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# **FLAG DESECRATION AMENDMENT TO THE CONSTITUTION**

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**WEDNESDAY, MAY 24, 1995**

**HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.**

The subcommittee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Charles Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, Michael Patrick Flanagan, F. James Sensenbrenner, Jr., Martin R. Hoke, Barney Frank, Melvin L. Watt, José E. Serrano, and John Conyers, Jr.

Also present: Kathryn A. Hazeem, chief counsel; Jacqueline McKee, paralegal; and Robert Raben, minority counsel.

## **OPENING STATEMENT OF CHAIRMAN CANADY**

Mr. CANADY. The subcommittee will come to order.

This morning we will hear from several witnesses on the need for a constitutional amendment to allow Congress and the States to protect the flag of the United States from desecration. Forty-nine States have passed resolutions calling upon the Congress to pass a flag amendment and send it back to the States for ratification. In 1989, in *Texas v. Johnson*, the Supreme Court of the United States by a narrow 5-to-4 margin invalidated the laws of 48 States and an act of Congress and thus deprived the people of their right to protect the most profound and revered symbol of our national identity. H.J. Res. 79 proposes to amend the Constitution to restore the authority of Congress and the States which was taken away by the Supreme Court to pass legislation to protect the flag.

[The bill, H.J. Res. 79, follows:]

104TH CONGRESS  
1ST SESSION

## H. J. RES. 79

Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States.

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### IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1995

Mr. SOLOMON (for himself, Mr. MONTGOMERY, Mr. ALLARD, Mr. ANDREWS, Mr. ARCHER, Mr. ARMEY, Mr. BACHUS, Mr. BAESLER, Mr. BAKER of Louisiana, Mr. BALDACCIO, Mr. BALLENGER, Mr. BARCIA, Mr. BARR, Mr. BARRETT of Nebraska, Mr. BARTLETT of Maryland, Mr. BARTON of Texas, Mr. BASS, Mr. BATEMAN, Mr. BEREUTER, Mr. BEVILL, Mr. BILBRAY, Mr. BILIRAKIS, Mr. BISHOP, Mr. BLILEY, Mr. BLUTE, Mr. BOEHLERT, Mr. BOEHNER, Mr. BONO, Mr. BREWSTER, Mr. BROWDER, Mr. BROWNBACK, Mr. BRYANT of Tennessee, Mr. BUNN of Oregon, Mr. BUNNING of Kentucky, Mr. BURR, Mr. BURTON of Indiana, Mr. BUYER, Mr. CALLAHAN, Mr. CALVERT, Mr. CAMP, Mr. CANADY of Florida, Mr. CHABOT, Mr. CHAMBLISS, Mrs. CHENOWETH, Mr. CHRISTENSEN, Mr. CHRYSLER, Mrs. CLAYTON, Mr. CLEMENT, Mr. COBLE, Mr. COBURN, Mr. COLLINS of Georgia, Mr. COMBEST, Mr. COOLEY, Mr. COSTELLO, Mr. COX of California, Mr. CRAMER, Mr. CRANE, Mr. CRAPO, Mr. CREMEANS, Mrs. CUBIN, Mr. CUNNINGHAM, Ms. DANNER, Mr. DAVIS, Mr. DE LA GARZA, Mr. DEAL of Georgia, Mr. DELAY, Mr. DIAZ-BALART, Mr. DICKEY, Mr. DOOLITTLE, Mr. DORNAN, Mr. DOYLE, Mr. DREIER, Mr. DUNCAN, Ms. DUNN of Washington, Mr. EHRLICH, Mr. EMERSON, Mr. ENGLISH of Pennsylvania, Mr. ENSIGN, Mr. EVERETT, Mr. FAWELL, Mr. FIELDS of Texas, Mr. FLANAGAN, Mr. FOLEY, Mr. FORBES, Mrs. FOWLER, Mr. FOX of Pennsylvania, Mr. FRANKS of Connecticut, Mr. FRANKS of New Jersey, Mr. FRELINGHUYSEN, Mr. FRISA, Mr. FUNDERBURK, Mr. GALLEGLY, Mr. GANSKE, Mr. PETE GEREN of Texas, Mr. GILMAN, Mr. GOODLATTE, Mr. GOODLING, Mr. GOSS, Mr. GRAHAM, Mr. GENE GREEN of Texas, Mr. GUNDERSON, Mr. GUTKNECHT, Mr. HALL of Texas, Mr. HANCOCK, Mr. HANSEN, Mr. HASTERT, Mr. HASTINGS of Washington, Mr. HAYWORTH, Mr. HEFLEY, Mr. HEFNER, Mr. HEINEMAN, Mr. HERGER, Mr. HILLEARY, Mr. HOBSON, Mr. HOLDEN, Mr. HORN, Mr. HOSTETTLER, Mr. HUNTER, Mr. HUTCHINSON, Mr. HYDE, Mr. ISTOOK, Mr. JACOBS, Mr. JEFFERSON, Mr. JOHNSON of South Dakota, Mr. SAM JOHNSON of Texas, Mr. JONES, Mr. KASICH, Mrs. KELLY, Mr. KING, Mr. KINGSTON, Mr. KNOLLENBERG, Mr.



LAHOOD, Mr. LARGENT, Mr. LATHAM, Mr. LATOURETTE, Mr. LAUGHLIN, Mr. LAZIO of New York, Mr. LEWIS of Kentucky, Mr. LIGHTFOOT, Mr. LINDER, Mr. LIPINSKI, Mr. LIVINGSTON, Mr. LOBIONDO, Mr. LONGLEY, Mr. LUCAS, Mr. MANTON, Mr. MANZULLO, Mr. MARTINEZ, Mr. MARTINI, Mr. MASCARA, Mr. MCCOLLUM, Mr. MCCRERY, Mr. MCDADE, Mr. MCHUGH, Mr. MCINNIS, Mr. MCINTOSH, Mr. MCKEON, Mr. McNULTY, Mr. MENENDEZ, Mr. METCALF, Mrs. MEYERS of Kansas, Mr. MICA, Ms. MOLINARI, Mr. MOORHEAD, Mr. MURTHA, Mr. MYERS of Indiana, Mrs. MYRICK, Mr. NETHERCUTT, Mr. NEUMANN, Mr. NEY, Mr. NORWOOD, Mr. NUSSLE, Mr. ORTIZ, Mr. OXLEY, Mr. PACKARD, Mr. PALLONE, Mr. PARKER, Mr. PAXON, Mr. PAYNE of Virginia, Mr. PETERSON of Minnesota, Mr. PICKETT, Mr. POMBO, Mr. POMEROY, Mr. QUILLEN, Mr. QUINN, Mr. RADANOVICH, Mr. RAHALL, Mr. RAMSTAD, Mr. RIGGS, Mr. ROBERTS, Mr. ROGERS, Mr. ROSE, Mr. ROTH, Mrs. ROUKEMA, Mr. ROYCE, Mr. SALMON, Mr. SAXTON, Mr. SCARBOROUGH, Mr. SCHAEFER, Mrs. SEASTRAND, Mr. SENSENBRENNER, Mr. SCHIFF, Mr. SHUSTER, Mr. SISISKY, Mr. SKEEN, Mr. SKELTON, Mr. SMITH of New Jersey, Mrs. SMITH of Washington, Mr. SOUDER, Mr. SPENCE, Mr. STEARNS, Mr. STOCKMAN, Mr. STUMP, Mr. STUPAK, Mr. TALENT, Mr. TATE, Mr. TAUZIN, Mr. TAYLOR of Mississippi, Mr. TAYLOR of North Carolina, Mr. TEJEDA, Mr. THOMAS, Mr. THORNBERRY, Mrs. THURMAN, Mr. TIAHRT, Mr. TORKILDSEN, Mr. TOWNS, Mr. TRAFICANT, Mr. TUCKER, Mr. UPTON, Mr. VOLKMER, Mrs. VUCANOVICH, Mrs. WALDHOLTZ, Mr. WALSH, Mr. WAMP, Mr. WATTS of Oklahoma, Mr. WELDON of Florida, Mr. WELDON of Pennsylvania, Mr. WELLER, Mr. WHITFIELD, Mr. WICKER, Mr. WILSON, Mr. WISE, Mr. WOLF, Mr. YOUNG of Alaska, Mr. YOUNG of Florida, Mr. ZELIFF, and Mr. ZIMMER) introduced the following joint resolution; which was referred to Committee on the Judiciary

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## JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States.

- 1 *Resolved by the Senate and House of Representatives*
- 2 *of the United States of America in Congress assembled,*
- 3 *(two-thirds of each House concurring therein), That the*
- 4 *following article is proposed as an amendment to the Con-*

1 stitution of the United States, which shall be valid to all  
2 intents and purposes as part of the Constitution when  
3 ratified by the legislatures of three-fourths of the several  
4 States within seven years after the date of its submission  
5 for ratification:

6 "ARTICLE —

7 "The Congress and the States shall have power to  
8 prohibit the physical desecration of the flag of the United  
9 States."

Mr. CANADY. After the Supreme Court's decision in *Johnson*, the House passed the Flag Protection Act of 1989 with overwhelming support by a vote of 380 to 38. The statute which became law in October 1989 was specifically crafted to respond to concerns raised by the Supreme Court in *Johnson*. Unfortunately, this statute was struck down by the Supreme Court, in *U.S. v. Eichman* in June 1990.

I believe, as do many of my colleagues, that both *Johnson* and *Eichman* were improperly decided. There are Members, however, who are of the opinion that these cases were correctly decided. We seek their support for this amendment as well.

Our flag is not a reputation or symbol of the crown or a monarch or an absolute sovereign. It represents We, the People, in the most successful exercise in self-government in the history of the world. Just as it is well established that the Supreme Court interprets the Constitution, so it is also well established that the people through their elected representatives, have the power and the right to amend the Constitution through article V. If Members want to protect the flag, they need to support this constitutional amendment. There is no other way to show your support for protecting the flag. That is why this subcommittee will be moving forward with a constitutional amendment to protect the flag from desecration pursuant to the procedures set forth by the Framers in article V of our Constitution.

This morning we will have three panels of witnesses. Our first panel consists of two distinguished Members of Congress. Representative Gerald Solomon, the chairman of the Rules Committee, is in his ninth term representing the 22d District of New York. Representative G.V. (Sonny) Montgomery represents the Third District of Mississippi; he currently serves on the Committee on Veterans' Affairs.

Gentlemen, we welcome both of you and, without objection, your full statements will be included in the hearing record. I want to thank both of you for your outstanding leadership on this very important issue.

Before we begin with the testimony of Mr. Solomon, I would like to ask if Mr. Hyde would like to make a statement.

Mr. HYDE. I thank the chairman very much for holding these hearings and giving me the opportunity to speak and welcome two of the most distinguished Members. That word is used sometimes cavalierly, but Mr. Solomon and Mr. Montgomery have long records of exemplary service to their people and to the people of America. It is a delight to be with them.

This issue is not a simple issue. Free speech is one of our most cherished liberties in this country, and it is liberty that we are about. And free speech means nothing if it doesn't mean freedom of speech to the speech you hate.

Listen to somebody say something that just rubs you the wrong way, that grates, that you oppose; that is real freedom of speech. Freedom of speech just doesn't mean saying things that you agree with or that you are neutral about.

Now, that said, we get to this issue of whether this piece of cloth with stripes and stars on it is somehow sacred in a secular way, or somehow different, and that burning it is not simply an exercise



of symbolic free speech but something more than that. I come down on the side of it is something more than that. It is not simply an exercise of the—of free speech and the speech you hate.

This country is utterly unique of all countries in the world lacking cultural ethnic homogeneity. We are Poles and Greeks and Jews and Catholics and atheists and Mormons and Baptists and Irish and Swiss and German and Hispanic and Mexican and African-American. We are absolutely a people of many differing cultures and ethnicities and religious persuasions.

But there are things that bind us. There are things that we uniquely share in common, and one is a love of freedom, one is a land of opportunity, and all those things that the Declaration of Independence guaranteed us. And the flag symbolizes the things we have in common and that bind us together.

Too many men have marched behind it, too many men have come home with the flag on their coffin, too many parents and widows and survivors have clutched a folded triangle of the flag to their bosom to hold that the flag simply is an expression of symbolic speech. It stands for everything precious and dear that people have given their lives for through the history of this country, and it ought to be treated specially.

So my sense of the broadness and the breadth of freedom of speech is not violated by saying there are some things you can't do. Some things you ought not to do.

We have lost the sense of the sacred in our society today, but I think this flag, which stands for this history of this young, magnificent, unique experiment in ordered liberty deserves to be protected; and so I—I certainly support Mr. Solomon, Mr. Montgomery, and I think these hearings are going to be a big help in explicating the nuances of this complex issue.

Thank you.

Mr. CANADY. Thank you, Mr. Hyde.

Mr. Solomon.

#### **STATEMENT OF HON. GERALD B.H. SOLOMON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK**

Mr. SOLOMON. Well, Mr. Chairman—Mr. Chairman Canady and, certainly, Chairman Hyde, I can't tell you what a privilege it is to sit here and see you two gentlemen in the positions that you presently have. We commend you for the outstanding efforts over the past several months. Your committee has had its backs to the wall, and you have just done yeoman work; and that is why we, Sonny Montgomery and I, are deeply appreciative that you could fit this into the schedule. We know there are other pressing issues that come before you and we appreciate that.

I appreciate the opportunity to come and testify today with my great friend from Mississippi, Sonny Montgomery, the former chairman of the Veterans' Affairs Committee and now the ranking minority member of that body. He is an outstanding American.

He and I are here today also representing two other outstanding Americans. One is Senator Orrin Hatch, who is the chairman of your counter-committee over in the Senate, the Judiciary Committee.

And another great American who will be leaving us in the not-too-distant future because he is retiring, and that is Senator Howell Heflin. And he, as you all know, is a very famous jurist, a very good Senator, even though he is on the other side of the aisle, as is my good friend Sonny Montgomery. They are both great.

Let me just say that sometimes on issues like this I guess I have been known to wax emotional. I am going to try and not do that here today, because today we are here to ask you to mark up this proposed constitutional amendment and we hope that you will do so by leaving it in the exact wording that it is today. And that wording, Mr. Chairman, is, "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

The reason that it is important to leave it as it is is this, Mr. Chairman. This is given to me by the Citizens Flag Alliance. It contains statements that have—from 49 of 50 States that have memorialized this Congress to enact this constitutional amendment in its exact form. And what that means, Mr. Chairman, is that if we do that and we successfully pass it in both Houses and we pass it on to the people of the United States of America, it means that, without question, this will probably be the fastest constitutional amendment ever ratified in the history of this Nation.

Now, before going any further, I would just ask your indulgence to maybe introduce some Members that are in the audience here today because they speak to the grassroots movement that is out there. And I know it may be inappropriate perhaps to go through a litany of names, but just to list some that are exemplary we have Dan Wheeler, who is the president of the Citizens Alliance.

The Citizens Alliance is a group of major veterans organizations, every major veterans organization across this Nation of ours, men and women who have served in the Armed Forces of the United States of America. It is made up of not only those veterans organizations but many other grassroots organizations as well that do not necessarily represent those former members of the armed services. There are organizations like the Elk's Lodge, which I belong to, the National Elk's Lodge; there are organizations like the Masons, which I also happen to belong to. There are religious organizations like the Knights of Columbus; and I could go on and on and on with all of these community-minded organizations that makeup the grassroots movement that brings us here today.

Mr. Chairman, it is important for many reasons for us to pass this amendment today, but the overwhelming reason, I think, is that the American people want it; 80 percent of the people in this country want this amendment. In Congress, it is supported by Members from both sides of the aisle in both Chambers; as I said, a stunning example is Sonny Montgomery sitting next to me today.

And I might just digress for a minute after mentioning Dan Wheeler's name to also list the commander of an organization that I belong to—I am a life member of it—and that is the American Legion. I should say the national commander with us today is Commander Bill Detweiler sitting directly behind and between Sonny Montgomery and myself.

In addition to him, we also have someone who probably this means more than perhaps anybody else in this room here today,

and that is the past national president of the Gold Star Wives, Rose Lee, who sits directly behind me, as well.

So, Mr. Chairman, in the history of the Supreme Court, few members guarded the first amendment so jealously and so zealously as Justice Hugo Black and Chief Justice Earl Warren. Think about that for a minute. Both stated forcefully that there is no first amendment problem with banning flag desecration. There is, in other words, nothing that prevents individual States from enacting laws that prohibit the physical desecration of the American flag; and I can't make this distinction too forcefully, Mr. Chairman. We seek not an amendment to ban flag desecration, but an amendment to allow each of the 50 States to make that decision.

The Constitution is designed to curb the Federal Government, not the States. Where the Constitution is silent, the States may act. So, yes, you may all see this, if you would like, as part of the movement to turn power back to the States; and I suppose it is with one avenue of thought. You know, one vote, I repeat, one vote in a 5-to-4 decision turned the courts back on the tradition of Justice Black and Chief Justice Warren, and all of a sudden flag-burning became expression protected by the first amendment.

But the very analysis of that slim majority did not support that conclusion. They said that the Government cannot prohibit the expression of any idea just because society finds that idea offensive or disagreeable. But the Texas law overturned in that 1989 decision did not suppress any idea at all.

Look at it this way. What idea does burning the flag really communicate? What thought does it express? Obviously none. Under that Texas statute and others like it, no one was prevented from speaking about the flag or even from insulting it verbally. It only said they couldn't burn it.

After all, Mr. Chairman, every one of us understands that no right is absolute. We cannot yell "fire" in a crowded theater. We all know that. We cannot holler obscenities on the corner of a residential neighborhood and not get arrested for disturbing the peace. And if I don't like someone, I can say so, but I can't go out and express my dislike by punching him in the nose. When my dislikes go from thoughts or words to action, well, then I have crossed the line that the Supreme Court itself has drawn in the sand over and over and over again.

The finest constitutional minds in the country, including Judge Robert Bork and legal scholars Stephen Presser and Richard Parker, liberals and conservatives, tell us that it is not a first amendment issue.

I would just cite, if I could, Judge Bork in an article, a bedrock principle of free speech. And just to quote him, he says, "It has been said that we should not amend the U.S. Constitution to protect the flag, but the fact is an amendment would restore the rights of the people without harming freedom of speech." And I think that says it all.

They will tell you that for any society to survive, these scholars that are going to come after me today, that there has to be some consensus of limitation. Every viable society has to be able to say, this you shall not do; we, as a community, find this highly offen-



sive. And that is the case with desecrating the American flag. The only alternative is chaos and fragmentation.

This is true even in a society as pluralistic and diverse as our own. In such a society, it is all the more important to protect the most important symbol of unity that we have, and what is more important than Old Glory? It is what makes us Americans and not something else. That is really what this is all about.

You know, we are celebrating the 50th anniversary of the Battle of Iwo Jima, and we all know the Marines didn't run a copy of the Constitution up a flagpole on Mount Suribachi. We don't fly the Presidential Seal at half-mast from our Federal buildings. We don't salute the Liberty Bell.

So it has been said across the world, whether it has been in Manila or Paris or Kuwait City, when American troops have liberated cities from oppressors, they have been greeted by grateful people waving not the Constitution, not the Presidential Seal, not Big Macs or blue jeans, but they have been waving what stands behind you, Mr. Chairman, that beautiful American flag.

And that love of the flag certainly isn't dead in our own country because, as I mentioned before, 80 percent of the American people, by all the polls, want this amendment. Over 80 civic and veterans organizations attended our rally to support it out here at the Capitol steps not too long ago.

Forty-nine States, as I mentioned, have asked Congress to pass this specific amendment. That is 11 more than the 38 needed to ratify it. We are only a few sponsors short in both the House and the Senate. I think when I came in this morning we had 276 co-sponsors without even having gone to the floor and sought those signatures, 276. We have another 20 who have already committed to vote for it even though they may not be sponsors today. That is more than the 290 necessary.

And over in the Senate, Senator Heflin and Senator Hatch are making like progress.

Mr. Chairman, consensus and reasoned arguments are going to enact this amendment, not the passions and the politics of this moment here today. The very difficulty of amending the Constitution will prevent that from happening just as it has prevented frivolous amendments for the past 200 years. And so, to sum up, we are not banning desecration of the flag. We are only giving the States the right to do so, a right that they have really always had up until that Supreme Court decision back in 1989. Not only does our amendment enhance, rather than threaten, the first amendment, but burning the flag is not speech or expression; in my opinion, it is a hateful tantrum.

And finally the American people and the constituents of every Member in this room want us to pass this amendment. So Mr. Chairman, again, from deep in my heart, I want to thank you and Chairman Hyde for holding this hearing today.

We spoke to the majority leader at a meeting yesterday. He has agreed to put this amendment on the floor of Congress on June 28, just before we break for the brief July 4th recess, and we hope that your subcommittee and your committee will see fit to send it to my Rules Committee. And let me assure you that you will receive expedited procedure once it reaches the Rules Committee.

Mr. Chairman, thank you so very, very much.

Mr. CANADY. Thank you, Mr. Solomon.

[The prepared statement of Mr. Solomon follows:]

PREPARED STATEMENT OF HON. GERALD B. SOLOMON, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NEW YORK

Thank you very much, Chairman Canady and panel members, for inviting me here today to testify on protecting our flag.

I also want to commend Mr. Canady and other co-sponsors of this bill. And let me add this: with such good people on my side I can't wait to present this amendment . . . first on the floor . . . and then to the states for ratification.

But first, with your indulgence Mr. Chairman, I'd like to tell you why I think this amendment is so important.

It's important for many reasons. First of all, the overwhelming majority of Americans want this amendment.

In Congress, it's supported by members from both sides of the aisle, in both chambers. The presence of my good friend Sonny Montgomery next to me today is proof of that.

And finally . . . and this may be even more important. I'm joined by constitutional scholars in saying this amendment actually *strengthens* our First Amendment freedoms.

I emphasize that, Mr. Chairman, because some Americans have raised questions about our fundamental freedoms of speech and expression. I have the same concerns they do, and they deserve some straight answers.

Now, I'm not going to spend too much time paying tribute to the flag. I'm sure it's safe to say that reverence for the flag is something everyone in this room shares.

Americans have always felt that way about their flag, and that's why there's so much precedent for what we're doing here today.

Some critics might say that the Supreme Court has spoken on the matter, and that's that! Well, not quite.

In the history of the Supreme Court, few members guarded the First Amendment so jealously as Justice Hugo Black and Chief Justice Earl Warren. Both stated forcefully that there is no First Amendment problem with banning flag desecration.

There is, in other words, *nothing that prevents individual states from enacting laws that prohibit the physical desecration of the American flag.* And I can't make this distinction too forcefully, Mr. Chairman . . .

We seek . . . not an amendment to ban flag desecration . . . but *an amendment to allow each of the 50 states to make that decision.* The Constitution is designed to curb the federal government, not the states. Where the Constitution is silent, the states may act!

So, yes, you may all see this, if you'd like, as part of the movement to turn power back to the states.

*One vote . . .* I repeat, one vote . . . in a 5-4 decision turned the Court's back on the tradition of Justice Black and Chief Justice Warren, and all of a sudden flag-burning became "expression" protected by the First Amendment. But the very analysis of that slim majority didn't support that conclusion.

They said that the government can't prohibit the expression of any idea, *just because society finds that idea offensive or disagreeable.*

But, the Texas law overturned in that 1989 decision didn't suppress any idea at all.

Look at this way. What idea does burning a flag communicate? What thought does it express? Obviously, none!

Under that Texas statute, and others like it, no one was prevented from speaking about the flag, or even from insulting it verbally. It only said they couldn't burn it.

After all, Mr. Chairman, everyone understands that no "right" is absolute. We can't yell "fire" in a crowded theater. We can't holler obscenities on the corner of a residential neighborhood and not get arrested for disturbing the peace.

And if I don't like someone, I can say so, but I can't express my dislike by punching him in the nose. When my dislike goes from thoughts, or words, to action, well, then I've crossed the line the Supreme Court itself has drawn in the sand over and over again.

The finest constitutional minds in the country . . . including Judge Robert Bork and legal scholars Stephen B. Presser and Richard D. Parker, tell us that this is not a First Amendment issue.

They will tell you that for any society to survive, there has to be some consensus on limitations. Every viable society has to be able to say: *"This you shall not do. We, as a community, find this highly offensive!"*

The only alternative is chaos and fragmentation. This is true even in a society as pluralistic and diverse as ours. In such a society, it's all the more important to protect the most important symbol of unity we have. And what's more important than Old Glory? It's what makes us Americans, and not something else.

You know, we're celebrating the 50th anniversary of the battle of Iwo Jima, and we all know that the marines didn't run a copy of the Constitution up a pole on Mount Suribachi. We don't fly the Presidential Seal at half-mast from our federal buildings. We don't salute the Liberty Bell.

And so it's been across the world. Whether it's been Manila, or Paris, or Kuwait City, whenever American troops have liberated cities from oppressors, they've been greeted by grateful people waving . . . not the Constitution, not the presidential seal, not Big Macs or blue jeans . . . *but the American flag.*

And that love of the flag certainly isn't dead in our own country. Eighty percent of the American people want this amendment. Over 80 civic and veterans organizations attended our rally in support of it.

Forty-nine states have asked Congress to pass this amendment. That's 11 more than the 38 needed to ratify it! We're only a few sponsors short in both the House and the Senate.

Mr. Chairman, consensus and reasoned arguments are going to enact this amendment, not the passions and politics of the moment. The very difficulty of amending the Constitution will prevent that from happening, just as it has prevented frivolous amendments for the 200 years.

And so, to sum up . . .

We're not banning desecration of the flag. We're only giving the states the right to do so, a right they've always had.

Not only does our amendment enhance rather than threaten the First Amendment, but burning the flag is not speech or expression, it's a hateful tantrum.

And finally, the American people . . . and the constituents of every member in this room . . . want us to pass this amendment.

Mr. CANADY. Mr. Montgomery.

#### STATEMENT OF HON. G.V. (SONNY) MONTGOMERY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. MONTGOMERY. Thank you very much, Mr. Chairman. I am sure if this amendment does get to the House Rules Committee it will come out quite quickly.

To you, Mr. Chairman, and to my Democratic colleagues on this committee and to Henry Hyde—to Chairman Hyde, we saw a lot of flags in Normandy when we went over there a year ago on June 6, 1994; and we saw a lot of little flags on the graves in France and Italy and Germany of Americans who lost their lives, 18 and 19 years old. I guess that impressed me more, that freedom doesn't come easily.

And the symbol for our country is the American flag, especially during World War II; and I am very honored to be with my good friend, Gerry Solomon in support of this constitutional amendment.

Now, Mr. Chairman, as you can tell, this is a bipartisan effort in the House. It is not a Republican or Democratic issue. It is a matter of protecting the single most recognized symbol of freedom and democracy that we have in the world. It really deserves special designation, and it can only be achieved by a constitutional amendment, as Jerry Solomon has said.

Now, we want to stress this, Mr. Chairman. This amendment will not harm any American's first amendment rights. We are the most tolerant country on Earth when it comes to dissent and criticism of our Government. We are simply drawing the line at the



physical desecration of the flag. And my colleagues who have seen this happen at every session of the House of Representatives, when we open that day, we open with prayer and we open with a Pledge of Allegiance. And every time we have a group of students in the gallery, from kindergarten on up, they proudly join in and you can hear their voices ring out, "I pledge allegiance to the flag of the United States of America."

That is very, very impressive. They learn the Pledge of Allegiance in the different schools. They know the pledge and they know what the flag means to our country. They really don't understand why anyone should be allowed to desecrate the flag.

Mr. Chairman, neither do I.

Now, as mentioned, this is the same flag that we saw on the island over at Iwo Jima, but really it meant more than just the taking of an island. It remains one of the most famous events in American history, and we see that statue right here in Washington, the raising of the flag.

Now, I want to point this out. This is the same flag that flew over the Federal building in Oklahoma City where 167 Americans died in that terrible bombing on April 19. Amid that destruction, while the crews looked for survivors, every day TV would show the American flag standing up there. It sent a message that the American spirit will not be broken.

Yes, Mr. Chairman, the flag has rallied our troops in battle. It has brought us together in times of national tragedy. Because it holds such a strong and emotional place in our lives, it is worthy of the protection we seek in this legislation.

As you know, our Founding Fathers never dreamed that someone would desecrate our flag. If they had, I am convinced they would have written this protection into the Constitution 218 years ago.

We have the opportunity to do what we will do with this amendment. I urge its quick approval, and thank you for giving us this opportunity.

Mr. CANADY. Thank you, Mr. Montgomery.

[The prepared statement of Mr. Montgomery follows:]

PREPARED STATEMENT OF HON. C.V. (SONNY) MONTGOMERY, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF MISSISSIPPI

Thank you, Mr. Chairman, for holding this hearing. I am honored to be here today with Rep. Gerry Solomon in support of our constitutional amendment to protect the American flag.

Mr. Chairman, this is a bi-partisan effort in the House. It is not a Republican or Democrat issue. It is a matter of protecting the single most recognized symbol of freedom and democracy in the world.

It deserves this special designation and it can only be achieved by a constitutional amendment.

And, Mr. Chairman, it won't harm any American's first amendment rights. We are the most tolerant country on Earth when it comes to dissent and criticism of our Government.

We are simply drawing the line at the physical desecration of the flag.

Each session of the House of Representatives opens with a prayer and Pledge of Allegiance. Every time we have a group of students in the gallery, from kindergarten on up, they proudly join in. You can hear their voices ring out. . . . "I pledge allegiance to the flag of the United States of America . . ."

They know the Pledge and they know what the flag means to our country. They don't understand why anyone should be allowed to desecrate the flag. And Mr. Chairman, neither do I.

This is the same flag that was raised over Mt. Suribachi on the island of Iwo Jima 50 years ago. It signified we had taken the high ground in that World War II battle. But it meant more than just the taking of an island. It remains one of the most famous events in American history. It lives forever as one of our shining moments in defense of freedom and democracy.

This is also the same flag that flew over the Federal building in Oklahoma City, where 167 Americans died in that terrible bombing on April 19. Amid that destruction, while the crews looked for survivors, the flag stood as a symbol of unity, and sent a message that the American spirit will not be broken.

Yes, Mr. Chairman, the flag has rallied our troops in battle. It has brought us together in times of national tragedy. Because it holds such a strong and emotional place in our lives, it is worthy of the protection we seek in this legislation.

Our Founding Fathers never dreamed some would desecrate our beloved flag. If they had, I am convinced they would have written this protection into the Constitution 218 years ago.

We have the opportunity to do that with this amendment. I urge its quick approval. Thank you.

Mr. CANADY. We appreciate both of you being with us today. I want to assure you that we have scheduled a markup of the amendment tomorrow at 10:30, and I understand from the chairman of the full committee that we will be proceeding with a markup in the full committee in due course and in short order. So we intend to move forward on this in an expeditious manner.

We appreciate both of you being here with us today. Thank you very much.

Mr. SOLOMON. Mr. Chairman, if I might, I have some extraneous material received from the Congressional Research Service. It deals with the Flag Code. It deals with certain laws dealing with our American flag. And, you know, the question could be asked how will we define, you know, what the Flag Code is, what would be "desecration." And again, I would just point out that the States have the right to define these in statute in the amendment that we are asking for today.

It is an amendment of principle, and for there to be a law, then any individual State or the Congress, the Congress of the United States would then have to enact a statute. And this might serve as evidence that statutes might come once this constitutional amendment is ratified. And I would ask unanimous consent to submit it for the record.

Mr. CANADY. Without objection, so ordered.

Mr. SOLOMON. Mr. Chairman, thank you again very, very much.

Mr. CANADY. Thank you.

[The information follows:]

**36 § 172****PATRIOTIC SOCIETIES, ETC. Ch. 10****Note 1**

*Boiling v. Superior Court for Clallam County*, 1943, 133 P.2d 803, 16 Wash.2d 373.

**§ 173. Display and use of flag by civilians; codification of rules and customs; definition**

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter shall be defined according to sections 1 and 2 of Title 4 and Executive Order 10834 issued pursuant thereto.

(June 22, 1942, c. 435, § 1, 56 Stat. 377; Dec. 22, 1942, c. 806, § 1, 56 Stat. 1074; July 7, 1976, Pub.L. 94-344, § 1(1), 90 Stat. 810.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**  
1976 Act. Senate Report No. 94-797, see 1976 U.S.Code Cong. and Adm.News, p. 1515.

**References in Text**

This chapter, referred to in text, probably means chapter 435 of Act June 22, 1942, 56 Stat. 380, which comprises sections 171 to 178 of this title.

Executive Order 10834, referred to in text, is Ex. Ord. No. 10834, Aug. 21, 1959,

24 F.R. 79, which is set out as a note under section 1 of Title 4, Flag and Seal, Seat of Government, and the States.

**Amendments**

**1976 Amendment.** Pub.L. 94-344 added provisions defining "flag of the United States" for purposes of this chapter according to sections 1 and 2 of Title 4 and Executive Order 10834.

**1942 Amendment.** Act Dec. 22, 1942, reenacted section without change.

**CROSS REFERENCES**

Modification of rules and customs by President, see 36 USCA § 178.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**NOTES OF DECISIONS**

**Generally 2**

**Purpose 1**

**State and local regulations 3**

**1. Purpose**

Federal flag code is not intended to proscribe behavior but is fashioned as expression of prevalent custom and usage regarding display of American flag. *Lapolla v. Dullaghan*, 1970, 311 N.Y.S.2d 435, 63 Misc.2d 157.

**2. Generally**

Federal flag code provisions are not to be accorded full weight of statutory pro-

scription but are an expression of custom and usage which is designed for, and should be used by civilian authorities, including school districts. *Lapolla v. Dullaghan*, 1970, 311 N.Y.S.2d 435, 63 Misc.2d 157.

**3. State and local regulations**

Flag regulations of State Commission of Education determining material and size of flag, manner and place of display, care of flag and pledge to the flag are constitutional and do not contravene either United States Constitution or New York State Constitution. *Lapolla v. Dul-*



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laghan, 1970, 311 N.Y.S.2d 435, 63 Misc.2d 157.

This section and section 174-178 of this title codifying existing rules and customs for display and use of flag by civilians does not deprive the states of the

power to regulate the conduct of citizens of the state toward the United States flag when such conduct is likely to produce a breach of the peace within their borders. *People v. Von Rosen*, 1958, 147 N.E.2d 327, 13 Ill.2d 68.

**§ 174. Time and occasions for display****(a) Displays on buildings and stationary flagstuffs in open; night display**

It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstuffs in the open. However, when a patriotic effect is desired, the flag may be displayed twenty-four hours a day if properly illuminated during the hours of darkness.

**(b) Manner of hoisting**

The flag should be hoisted briskly and lowered ceremoniously.

**(c) Inclement weather**

The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.

**(d) Particular days of display**

The flag should be displayed on all days, especially on New Year's Day, January 1; Inauguration Day, January 20; Lincoln's Birthday, February 12; Washington's Birthday, third Monday in February; Easter Sunday (variable); Mother's Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Independence Day, July 4; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.

**(e) Display on or near administration building of public institutions**

The flag should be displayed daily on or near the main administration building of every public institution.

**(f) Display in or near polling places**

The flag should be displayed in or near every polling place on election days.

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## PATRIOTIC SOCIETIES, ETC. Ch. 10

**(g) Display in or near schoolhouses**

The flag should be displayed during school days in or near every schoolhouse.

(June 22, 1942, c. 435, § 2, 56 Stat. 378; Dec. 22, 1942, c. 806, § 2, 56 Stat. 1074; July 7, 1976, Pub.L. 94-344, § 1(2)-(5), 90 Stat. 810.)

**HISTORICAL AND STATUTORY NOTES****Revision Notes and Legislative Reports**

1976 Act. Senate Report No. 94-797, see 1976 U.S. Code Cong. and Adm. News, p. 1515.

**Codifications**

Veterans Day was substituted for Armistice Day, to conform to the provisions of Act June 1, 1954, c. 250, 68 Stat. 168. See section 6103 of Title 5, Government Organization and Employees.

**Amendments**

1976 Amendment. Subsec. (a). Pub.L. 94-344, § 1(2), substituted provision permitting display of the flag for 24 hours a day to produce a patriotic effect if flag is properly illuminated during the hours of darkness, for provision permitting night display of the flag upon special occasions when it is desired to produce a patriotic effect.

Subsec. (c). Pub.L. 94-344, § 1(3), added provision excepting display of all weather flag.

- Subsec. (d). Pub.L. 94-344, § 1(4), eliminated references to "when the weather permits" following "displayed on all days" and "Army Day, April 6" preceding "Easter Sunday", added reference to "Armed Forces Day, third Saturday in May", and substituted "third Monday in February" for "February 22", "the last Monday in May" for "May 30", and "second Monday in October" for "October 12".

Subsec. (e). Pub.L. 94-344, § 1(5), struck out ", weather permitting," following "displayed daily".

1942 Amendment. Act Dec. 22, 1942, substituted "fourth Thursday in November" for "last Thursday in November."

**Flag House Square, Baltimore, Maryland; Display of Flag; Time**

Act Mar. 26, 1954, c. 109, 68 Stat. 35, provided:

"That notwithstanding any rule or custom pertaining to the display of the flag of the United States of America as set forth in the joint resolution entitled 'Joint resolution to codify and emphasize existing rules and customs pertaining to

the display and use of the flag of the United States of America', approved June 22, 1942, as amended [sections 171 to 178 of this title], authority is hereby conferred on the appropriate officer of the State of Maryland to permit the flying of the flag of the United States for twenty-four hours of each day in Flag House Square, Albemarle and Pratt Streets, Baltimore, Maryland.

"Sec. 2. Subject to the provisions of section 3 of the joint resolution of June 22, 1942, as amended [section 175 of this title], authority is also conferred on the appropriate officer of the State of Maryland to permit the flying of a replica of the flag of the United States which was in use during the War of 1812 for twenty-four hours of each day in Flag House Square, Albemarle and Pratt Streets, Baltimore, Maryland."

**Lexington, Massachusetts; Display of Flag**

Pub.L. 89-335, Nov. 8, 1965, 79 Stat. 1294, provided: "That, notwithstanding any rule or custom pertaining to the display of the flag of the United States of America as set forth in the joint resolution entitled 'Joint resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America', approved June 22, 1942 (36 U.S.C. 171-178) [sections 171 to 178 of this title], the flag of the United States of America may be flown for twenty-four hours of each day on the green of the town of Lexington, Massachusetts. The flag may not be flown pursuant to the authority contained in this Act [this note] during the hours from sunset to sunrise unless it is illuminated."

**Valley Forge State Park, Pennsylvania; Display of Flag**

Pub.L. 94-53, July 4, 1975, 89 Stat. 259, provided: "That, notwithstanding the rule or custom pertaining to the display of the flag of the United States of America between sunrise and sunset, as set forth in section 2(a) of the joint resolution, entitled, 'Joint resolution to codify and emphasize existing rules and cus-

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36 § 174

ions pertaining to the display and use of the flag of the United States of America, approved June 22, 1942 (36 U.S.C. 174(a)) (subsec. (a) of this section), the flag of the United States of America may be flown for twenty-four hours of each day on the grounds of the National Me-

morial Arch in Valley Forge State Park, Valley Forge, Pennsylvania. The flag may not be flown pursuant to the authority contained in this Act [this note] during the hours from sunset to sunrise unless it is illuminated."

## PROCLAMATIONS

## PROCLAMATION NO. 4064

July 6, 1971, 36 F.R. 12967

## DISPLAY OF FLAGS AT THE WASHINGTON MONUMENT

The Washington Monument stands day and night as America's tribute to our first President. The fifty American flags that encircle the base of the Monument represent our fifty States and, at the same time, symbolize our enduring Federal Union.

As this Nation's 200th year approaches, I believe that it would do all Americans well to remember the years of our first President and to recall the enduring ideals of our Nation.

As an expression of our rededication to the ideals of America and in accordance with the joint resolution of Congress of June 22, 1942 (56 Stat. 377), as amended by the joint resolution of December 22, 1942, (56 Stat. 1074) [this section], which permits the flag to be displayed at night "upon special occasions when it is desired to produce a patriotic effect," it is appropriate that our national colors henceforth be dis-

played day and night at the Washington Monument.

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, do hereby proclaim that, effective July 4, 1971 the fifty flags of the United States of America displayed at the Washington Monument in the District of Columbia be flown at all times during the day and night, except when the weather is inclement.

The rules and customs pertaining to the display of the flag as set forth in the joint resolution of June 22, 1942, as amended [section 173 et seq. of this title], are hereby modified accordingly.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of July, in the year of our Lord nineteen hundred seventy-one, and of the Independence of the United States of America the one hundred ninety-sixth.

RICHARD NIXON

## PROCLAMATION NO. 4131

May 5, 1972, 37 F.R. 9311

## DISPLAY OF FLAG AT UNITED STATES CUSTOMS PORTS OF ENTRY

The flag of the United States should be one of the first things seen at our Customs ports of entry, both by American citizens returning from abroad and by travelers from other countries.

As the symbol of our country and our freedoms, the national colors of the United States provide a welcome greeting of warm promise.

Many people, however, enter our country at night when the flag is not flown, because of the nearly universal custom of displaying it only from sunrise to sunset.

Authority exists to amend that custom. A Congressional joint resolution of June

22, 1942 (56 Stat. 377), as amended (36 U.S.C. 173-178), permits the flag to be displayed at night "upon special occasions when it is desired to produce a patriotic effect."

I believe it is appropriate that returning citizens and visitors from other countries be welcomed by our flag whether they arrive at their ports of entry by night or by day.

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, do hereby proclaim that the flag of the United States of America shall hereafter be displayed at all times during the day and night, except when the



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weather is inclement, at United States Customs ports of entry which are continually open.

The rules and customs pertaining to the display of the flag, as set forth in the joint resolution of June 22, 1942, as amended, are hereby modified accordingly.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of May, in the year of our Lord nineteen hundred seventy-two, and of the Independence of the United States of America the one hundred ninety-sixth.

RICHARD NIXON

## CROSS REFERENCES

Modification of rules and customs by President, see 36 USCA § 178.

National observances, display of flag, see 36 USCA § 141 et seq.

## WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

## § 175. Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

(a) The flag should not be displayed on a float in a parade except from a staff, or as provided in subsection (i) of this section.

(b) The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof: *Provided*, That nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

(d) The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag's own right, and its staff should be in front of the staff of the other flag.

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags

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of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

(g) When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.

(h) When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out, union first, from the building.

(i) When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

(j) When the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

(k) When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

(l) The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

(m) The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff

until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff. The flag shall be flown at half-staff thirty days from the death of the President or a former President; ten days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. As used in this subsection—

(1) the term "half-staff" means the position of the flag when it is one-half the distance between the top and bottom of the staff;

(2) the term "executive or military department" means any agency listed under sections 101 and 102 of Title 5; and

(3) the term "Member of Congress" means a Senator, a Representative, a Delegate, or the Resident Commissioner from Puerto Rico.

(n) When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground.

(o) When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

(June 22, 1942, c. 435, § 3, 56 Stat. 378; Dec. 22, 1942, c. 806, § 3, 56 Stat. 1075; July 9, 1953, c. 183, 67 Stat. 142; July 7, 1976, Pub.L. 94-344, § 1(6)-(11), 90 Stat. 810, 811.)

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## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1953 Act. Senate Report No. 83-258,  
see 1953 U.S.Code Cong. and Adm.News,  
p. 1850.

1976 Act. Senate Report No. 94-797,  
see 1976 U.S.Code Cong. and Adm.News,  
p. 1515.

**Amendments**

1976 Amendment. Subsec. (b).  
Pub.L. 94-344, § 1(6) substituted "right  
fender" for "radiator cap".

Subsec. (f). Pub.L. 94-344, § 1(7),  
substituted "to the United States flag's  
right" for "to the right of the flag of the  
United States".

Subsec. (i). Pub.L. 94-344, § 1(8),  
substituted requirement that when the  
flag is displayed horizontally or vertical  
against a wall or in a window, the union  
should be uppermost and to the flag's  
own right for requirement that when the  
flag is displayed otherwise than from a  
staff, it should be displayed flat, whether  
indoors or out, or so suspended that it  
falls as free as though it were staffed.

Subsec. (k). Pub.L. 94-344, § 1(9),  
eliminated provisions relating to flag po-

sition when displayed on a staff in the  
chancel of a church or speaker's plat-  
form of an auditorium.

Subsec. (m). Pub.L. 94-344, § 1(10),  
added provisions relating to half-staff  
display of the flag on Memorial Day and  
upon the death of principal figures of  
the United States government and State  
governments and definitions of terms  
therein and eliminated provisions relat-  
ing to the affixing of crepe streamers to  
spearheads and flagstaves in a parade  
only on the order of the President.

Subsec. (o). Pub.L. 94-344, § 1(11),  
added subsec. (o).

1953 Amendment. Subsec. (c). Act  
July 9, 1953, added second sentence.

1942 Amendment. Subsec. (i). Act  
Dec. 22, 1942, added "or so suspended  
that its folds fall as free as though the  
flag were staffed", and omitted provi-  
sions when displayed against a wall or in  
a window.

Subsec. (m). Act Dec. 22, 1942, substi-  
tuted "lowering" for "hauling" in third  
sentence.

## PROCLAMATIONS

## PROCLAMATION NO. 3044

Mar. 1, 1954, 19 F.R. 1235, as amended by Proc. No. 3948, Dec. 12, 1969, 34  
F.R. 19699.

DISPLAY OF FLAG AT HALF-STAFF UPON DEATH OF CERTAIN  
OFFICIALS AND FORMER OFFICIALS

WHEREAS it is appropriate that the  
flag of the United States of America be  
flown at half-staff on Federal buildings,  
grounds, and facilities upon the death of  
principal officials and former officials of  
the Government of the United States and  
the Governors of the States, Territories,  
and possessions of the United States as a  
mark of respect to their memory; and

WHEREAS it is desirable that rules be  
prescribed for the uniform observance  
of this mark of respect by all executive  
departments and agencies of the Govern-  
ment, and as a guide to the people of the  
Nation generally on such occasions;

NOW, THEREFORE, I, DWIGHT D.  
EISENHOWER, President of the United  
States of America and Commander in  
Chief of the armed forces of the United  
States, do hereby prescribe and proclaim  
the following rules with respect to the  
display of the flag of the United States of

America at half-staff upon the death of  
the officials hereinafter designated:

1. The flag of the United States shall  
be flown at half-staff on all buildings,  
grounds, and naval vessels of the Fed-  
eral Government in the District of Colum-  
bia and throughout the United States  
and its Territories and possessions for  
the period indicated upon the death of  
any of the following-designated officials  
or former officials of the United States:

(a) The President or a former Presi-  
dent: for thirty days from the day of  
death.

The flag shall also be flown at half-  
staff for such period at all United States  
embassies, legations, and other facilities  
abroad, including all military facilities  
and naval vessels and stations.

(b) The Vice President, the Chief Jus-  
tice or a retired Chief Justice of the



## 36 § 175

## PATRIOTIC SOCIETIES, ETC. Ch. 10

United States, or the Speaker of the House of Representatives: for ten days from the day of death.

(c) An Associate Justice of the Supreme Court, a member of the Cabinet, a former Vice President, the President pro tempore of the Senate, the Majority Leader of the Senate, the Minority Leader of the Senate, the Majority Leader of the House of Representatives, or the Minority Leader of the House of Representatives: from the day of death until interment.

2. The flag of the United States shall be flown at half-staff on all buildings, grounds, and naval vessels of the Federal Government in the metropolitan area of the District of Columbia on the day of death and on the following day upon the death of a United States Senator, Representative, Territorial Delegate, or the Resident Commissioner from the Commonwealth of Puerto Rico, and it shall also be flown at half-staff on all buildings, grounds, and naval vessels of the Federal Government in the State, Congressional District, Territory, or Commonwealth of such Senator, Representative, Delegate, or Commissioner, respectively, from the day of death until interment.

3. The flag of the United States shall be flown at half-staff on all buildings and grounds of the Federal Government in a State, Territory, or possession of the United States upon the death of the Gov-

ernor of such State, Territory, or possession from the day of death until interment.

4. In the event of the death of other officials, former officials, or foreign dignitaries, the flag of the United States shall be displayed at half-staff in accordance with such orders or instructions as may be issued by or at the direction of the President, or in accordance with recognized customs or practices not inconsistent with law.

5. The heads of the several departments and agencies of the Government may direct that the flag of the United States be flown at half-staff on buildings, grounds, or naval vessels under their jurisdiction on occasions other than those specified herein which they consider proper, and that suitable military honors be rendered as appropriate.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 1st day of March in the year of our Lord nineteen hundred and fifty-four, and of the Independence of the United States of America the one hundred and seventy-eighth.

[SEAL]

DWIGHT D. EISENHOWER

### CROSS REFERENCES

Display of replica of flag used in War of 1812 for twenty-four hours each day in Flag House Square, Baltimore, Maryland, as subject to this section, see 36 USCA § 174 note.

Modification of rules and customs by President, see 36 USCA § 178.

### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

### NOTES OF DECISIONS

Generally 1  
Confederate flag 2  
Height of flag 3  
Injunction against display of flag 5  
Right of action 4

#### 1. Generally

This section relating to proper manner of display of national flag are not intended to proscribe conduct but are merely declaratory or advisory; recurrent use

of word "should" throughout such provisions is indicative of lack of penal purpose. *Holmes v. Wallace*, D.C. Ala. 1976, 407 F.Supp. 493, affirmed 540 F.2d 1083.

This section respecting position of American flag when displayed or carried with other flags was not intended to proscribe behavior but was rather fashioned as an expression of prevalent custom regarding the display of the American flag. *State of Del. ex rel. Trader v. Hodsdon*, D.C. Del. 1967, 265 F.Supp. 308.

## Ch. 10 PATRIOTIC CUSTOMS

36 § 176

## 2. Confederate flag

Congress, in enacting amendatory provision of this section prohibiting displaying of flags of international organizations or other nations in equal or superior prominence or honor to the flag of the United States, did not intend to prohibit state sponsored display of Confederate flag on dome of state capitol; provision of Flag Code was manifestly directed at other practices. *Holmes v. Wallace*, D.C.Ala.1976, 407 F.Supp. 493, affirmed 540 F.2d 1083.

## 3. Height of flag

Flying the flag of Republic of Panama and flag of United States in Canal Zone at equal heights on separate flag poles did not violate this section. *Doyle v. Fleming*, D.C.Canal Zone 1963, 219 F.Supp. 277.

## 4. Right of action

Provision of this code prohibiting display of flags of international organizations or other nations in equal or superior prominence or honor to flag of United States does not create any rights in private individuals and could not form basis for civil rights action alleging deprivation of rights, privileges, or immunities secured by constitution and laws. *Holmes v. Wallace*, D.C.Ala.1976, 407 F.Supp. 493, affirmed 540 F.2d 1083.

## 5. Injunction against display of flag

United States District Court did not have jurisdiction to enjoin defendant from flying the flag of the United Nations above and to the right of the American flag in front of his residence. *State of Del. ex rel. Trader v. Hodsdon*, D.C. Del.1967, 265 F.Supp. 308.

## § 176. Respect for flag

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor.

(a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.

(b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.

(c) The flag should never be carried flat or horizontally, but always aloft and free.

(d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker's desk, draping the front of the platform, and for decoration in general.

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

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## PATRIOTIC SOCIETIES, ETC. Ch. 10

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart.

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

(June 22, 1942, c. 435, § 4, 56 Stat. 379; Dec. 22, 1942, c. 806, § 4, 56 Stat. 1076; July 7, 1976, Pub.L. 94-344, § 1(12)-(16), 90 Stat. 812.)

### HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1976 Act. Senate Report No. 94-797, see 1976 U.S.Code Cong. and Adm.News, p. 1515.

#### Amendments

**1976 Amendment.** Par. (a). Pub.L. 94-344, § 1(12), inserted reference to instances of extreme danger to life or property.

Par. (d). Pub.L. 94-344, § 1(13), added requirement that a flag should never be used as wearing apparel or bedding.

Par. (e). Pub.L. 94-344, § 1(14), substituted "to permit" for "will permit".

Par. (l). Pub.L. 94-344, § 1(15), eliminated provision that the flag should not be used on a costume or athletic uniform.

Par. (j). Pub.L. 94-344, § 1(16), added par. (j). Former par. (j) was redesignated as (k).

Par. (k). Pub.L. 94-344, § 1(16), redesignated former par. (j) as (k).

**1942 Amendment.** Par. (g). Act Dec. 22, 1942, added "any" before "part".

### CROSS REFERENCES

Modification of rules and customs by President, see 36 USCA § 178.

Police uniforms, display of United States flag patch, pin, or other emblem, see 40 USCA § 210a.

### WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

### NOTES OF DECISIONS

#### 1. Refusal to salute or repeat pledge

Standing silently at attention while others salute and pledge allegiance to flag of the United States does not consti-

tute offense of "disrespect to the flag." *Bolling v. Superior Court for Clallam County*, 1943, 133 P.2d 803, 16 Wash.2d 373.

## Ch. 10 PATRIOTIC CUSTOMS

## 36 § 178

**§ 177. Conduct during hoisting, lowering or passing of flag**

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present except those in uniform should face the flag and stand at attention with the right hand over the heart. Those present in uniform should render the military salute. When not in uniform, men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Aliens should stand at attention. The salute to the flag in a moving column should be rendered at the moment the flag passes.

(June 22, 1942, c. 435, § 5, 56 Stat. 380; Dec. 22, 1942, c. 806, § 5, 56 Stat. 1077; July 7, 1976, Pub.L. 94-344, § 1(17), 90 Stat. 812.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**  
1976 Act. Senate Report No. 94-797,  
see 1976 U.S. Code Cong. and Adm. News,  
p. 1515.

**Amendments**

1976 Amendment. Pub.L. 94-344 substituted in first sentence "with right hand over the heart" for ", and salute" and struck out "Men without hats should salute in the same manner," preceding

"Aliens should" and "Women should salute by placing right hand over the heart," preceding "The salute to the flag".

1942 Amendment. Act Dec. 22, 1942, substituted "military salute", for "right-hand salute" in second sentence, "should salute in the same manner", for "merely stand at attention" in fourth sentence, and added fifth sentence.

**CROSS REFERENCES**

Alien as used in Immigration and Nationality Act defined, see 8 USCA § 1101.  
Modification of rules and customs by President, see 36 USCA § 178.

**WESTLAW ELECTRONIC RESEARCH**

See WESTLAW guide following the Explanation pages of this volume.

**§ 178. Modification of rules and customs by President**

Any rule or custom pertaining to the display of the flag of the United States of America, set forth in sections 171 to 178 of this title, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Armed Forces of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation.

(June 22, 1942, c. 435, § 8, 56 Stat. 380; Dec. 22, 1942, c. 806, § 8, 56 Stat. 1077; July 7, 1976, Pub.L. 94-344, § 1(20), 90 Stat. 813.)

**HISTORICAL AND STATUTORY NOTES**

**Revision Notes and Legislative Reports**  
1976 Act. Senate Report No. 94-797,  
see 1976 U.S. Code Cong. and Adm. News,  
p. 1515.

**References in Text**

Rules or customs set forth "herein", referred to in text, means rules or customs set forth in Act June 22, 1942, c.



## 36 § 178

## PATRIOTIC SOCIETIES, ETC. Ch. 10

435, 56 Stat. 377, which is classified to sections 171 to 178 of this title.

1942 Amendment. Act Dec. 22, 1942 reenacted section without change.

**Amendments**

1976 Amendment. Pub.L. 94-344 substituted "Armed Forces" for "Army and Navy".

**PROCLAMATIONS**

**PROCLAMATION NO. 2605**

Feb. 21, 1944, 9 F.R. 1957, 58 Stat. 1126

**THE FLAG OF THE UNITED STATES**

The flag of the United States of America is universally representative of the principles of the justice, liberty, and democracy enjoyed by the people of the United States; and

People all over the world recognize the flag of the United States as symbolic of the United States; and

The effective prosecution of the war requires a proper understanding by the people of other countries of the material assistance being given by the Government of the United States:

NOW, THEREFORE, by virtue of the power vested in me by the Constitution and laws of the United States, particularly by the Joint Resolution approved June 22, 1942, as amended by the Joint Resolution approved December 22, 1942 [sections 171-178 of this title], as President and Commander in Chief, it is hereby proclaimed as follows:

1. The use of the flag of the United States or any representation thereof, if approved by the Foreign Economic Administration, on labels, packages, cartons, cases, or other containers for articles or products of the United States

intended for export as lend-lease aid, as relief and rehabilitation aid, or as emergency supplies for the Territories and possessions of the United States, or similar purposes, shall be considered a proper use of the flag of the United States and consistent with the honor and respect due to the flag.

2. If any article or product so labelled, packaged or otherwise bearing the flag of the United States or any representation thereof, as provided for in section 1, should, by force of circumstances, be diverted to the ordinary channels of domestic trade, no person shall be considered as violating the rules and customs pertaining to the display of the flag of the United States, as set forth in the Joint Resolution approved June 22, 1942, as amended by the Joint Resolution approved December 22, 1942 (U.S. C.Supp. II, Title 36, secs. 171-178) (sections 171-178 of this title), for possessing, transporting, displaying, selling or otherwise transferring any such article or product solely because the label, package, carton, case, or other container bears the flag of the United States or any representation thereof.

**PROCLAMATION NO. 4000**

Sept. 4, 1970, 35 F.R. 14187

**DISPLAY OF FLAG AT WHITE HOUSE**

WHEREAS the joint resolution of Congress of June 22, 1942, entitled "Joint Resolution to Codify and Emphasize Existing Rules and Customs Pertaining to the Display and Use of the Flag of the United States of America," as amended by the joint resolution of December 22, 1942, 56 Stat. 1074 [sections 173 to 178 of this title], contains the following provisions:

"Sec. 2. (a) It is the universal custom to display the flag only from sunrise to

sunset on buildings and on stationary flagstaves in the open. However, the flag may be displayed at night upon special occasions when it is desired to produce a patriotic effect.

\* \* \* \* \*

"Sec. 8. Any rule or custom pertaining to the display of the flag of the United States of America, set forth herein, may be altered, modified, or re-

## Ch. 10 PATRIOTIC CUSTOMS

## 36 § 179

pealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Army and Navy of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation."; and

WHEREAS the White House is a house that belongs to all the people; and

WHEREAS the White House, as the home of the President and his family, symbolizes the love of home and family which has long characterized our people; and

WHEREAS it is customary for many of our own citizens and many persons from other countries who visit our Nation's Capital to view the White House at night; and

WHEREAS it is thus appropriate that the flag be flown over the White House by night as well as by day:

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, do hereby proclaim that the flag of the United States of America shall hereafter be displayed at the White House at all times during the day and night, except when the weather is inclement.

The rules and customs pertaining to the display of the flag as set forth in the joint resolution of June 22, 1942, as amended, are hereby modified accordingly.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of September, in the year of our Lord nineteen hundred and seventy, and of the Independence of the United States of America the one hundred and ninety-fifth.

RICHARD NIXON

## WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

## § 179. Design for service flag; persons entitled to display flag

The Secretary of Defense is authorized and directed to approve a design for a service flag, which flag may be displayed in a window of the place of residence of persons who are members of the immediate family of a person serving in the armed forces of the United States during any period of war or hostilities in which the Armed Forces of the United States may be engaged.

(Oct. 17, 1942, c. 615, § 1, 56 Stat. 796; May 27, 1953, c. 70, 67 Stat. 35.)

## HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports  
1953 Act. House Report No. 83-387,  
see 1953 U.S. Code Cong. and Adm. News,  
p. 1654.

## Amendments

1953 Amendment. Act May 27, 1953,  
substituted the words "Secretary of De-

fense" for "Secretary of War" and deleted the words "the current war" at the end of the section and inserted in lieu thereof the words "any period of war or hostilities in which the Armed Forces of the United States may be engaged."

## CROSS REFERENCES

Approval of design for service flag and service lapel button by Secretary of Defense, see 36 USCA § 181.

Rules and regulations for design and display of service flag and service lapel button, see 36 USCA § 182.

## WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

Mr. CANADY. I would like to ask now that the members of the second panel please come forward and take your seats.

While the witnesses are being seated, if any of the members of the subcommittee have statements, we will take those statements and make them a part of the record without objection.

[The prepared statement of Mr. Flanagan follows:]

PREPARED STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, as an original co-sponsor of H.J. Res. #79, I am proud to be here today and the next to help mark-up and report out the next amendment to the United States Constitution. Mr. Chairman, an amendment to prevent the purposeful and physical desecration of "Old Glory" will be an excellent addition to our Constitution—a document I believe to be the greatest invention ever created by Man.

This amendment is long overdue, and as a veteran and a patriotic American, I feel it is imperative that our beloved symbol of nationhood and freedom be guaranteed the respect that it deserves since it represents the souls of all those departed American heroes who fought so valiantly to protect it for over the last two hundred years.

Therefore, without further delay, I want to reiterate my strong support for H.J. Res. #79 and urge my colleagues to support it. I also want to thank all our witnesses for being here today and to help share with us this historic occasion.

Thank you, Mr. Chairman, for yielding me this time.

Mr. FRANK. Mr. Chairman.

Mr. CANADY. Mr. Frank.

Mr. FRANK. Before we begin, I might ask if I can make one explanatory remark about the witness panel.

Mr. CANADY. Yes, sir, you are recognized.

Mr. FRANK. Thank you. Working with the chairman, we try to achieve some kind of balance in viewpoints. This one is a little more unbalanced but it is not the fault of either the chairman or myself.

We had a second witness who was going to testify in opposition to the amendment but while he was going to testify as an individual, he happens to work for the National Rifle Association and the fact that he was going to testify was called to their attention and they apparently forbade him to testify.

I regret that. I wish their support of free speech were less selective but we did have another witness and in no way was his testimony going to represent anyone but himself. And I am sorry that the NRA did not want to let him testify but as—as an individual, but that does explain why there is a—less of a balance on this panel. It is not the fault of anyone here.

Mr. CANADY. I would like to introduce each of the members of our second panel and then we will ask them to make their statements. First, we will hear from Prof. Stephen Presser. Dr. Presser is the Raoul Berger Professor of Legal History at the Northwestern University School of Law.

Our next witness will be Clint Bolick. Mr. Bolick is the vice president and director of litigation at the Institute for Justice, a public interest law firm here in Washington, DC.

Mrs. Rose E. Lee is a former president of the Gold Star Wives of America, an organization comprised of widows of servicemen who were killed in action, died on active duty or died later of service-connected disabilities. Her late husband served in both Korea and Vietnam.

Our last witness on this panel will be Mr. William Detweiler, national commander of the American Legion.

We welcome each of you and ask that you take 5 minutes to summarize your testimony. And without objection your written statements will be included in the hearing record.

Professor Presser, would you please begin.

**STATEMENT OF STEPHEN B. PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW**

Mr. PRESSER. Thank you, Mr. Chairman. It is an honor and a privilege to be here with you this morning. I am, as you indicated, a professor at Northwestern University in Chairman Hyde's home State and I do appear before you this morning to testify in favor of the amendment.

You, Mr. Chairman, Mr. Hyde, Mr. Solomon and Mr. Montgomery made many of the points that I am going to make this morning and perhaps I would render you a service by not making them again.

But I am a law professor and I am going to make them again. I always tell my students that you often don't get an important legal or constitutional issue until you go over it at least three times, and I think we are going to be engaged in that a little bit this morning.

The first and most important point to make in support of this amendment is that it is precisely the kind of exercise of democracy that the Constitution's article V was designed to encourage. The level of public approval of this amendment, the 49 State legislatures that have passed resolutions in favor, the amount of support that the amendment already has in the House and Senate is unprecedented. I have been teaching legal and constitutional history for 21 years. I have not come across this kind of support for this kind of an effort.

All of this means that anyone who really believes in grassroots democracy ought to be sympathetic to the amendment for that reason alone. Moreover, as Chairman Hyde indicated very eloquently, the Supreme Court's banning of flag-burning statutes as a matter of constitutional law is quite controversial, quite difficult. I think wrong but reasonable people can differ on that.

But when a question is this close, the American people deserve a fair hearing on this close question and I think they deserve some deference. This is about more than academic theory this morning. This is about the way the American people understand their Constitution.

But there is a second reason to support the amendment apart from a belief in democracy. This amendment helps to redress a dangerous problem, a current imbalance in constitutional law. Our Constitution is about much more than individual self-indulgence, as Chairman Hyde indicated. The Constitution seeks to preserve a delicate balance between individual liberty and individual responsibility to the community.

Our constitutional law has become too concerned with the gratification of individual desires. What we as a community need is more attention paid to responsibility and self-restraint. Forgetting the



constitutional and legal lesson of the necessity for self-restraint has led to the current unhealthy social climate in this country. It is a climate of increased domestic and urban violence, a proliferation of out-of-wedlock births and even outrageously irresponsible acts, such as the Oklahoma City bombing.

Now the Supreme Court's decision in *Texas v. Johnson* of course is not responsible for all of this but it is part of the problem. In *Texas v. Johnson*, the court did abandon the wise thought on this issue as Mr. Solomon said by such great Justices as Hugo Black and Earl Warren. Black and Warren believed it was perfectly appropriate to ban flag-burning in order to promote other community values.

In 1989, though, in a decision by a bare 5-to-4 majority, the Supreme Court reversed many years of sensible jurisprudence. It confused an outrageous act of arson with the kind of liberty that the first amendment was designed to protect. The threat from a flag-burner to society may be small but there is a threat to the people's right to legislate to promote a spirit of community and responsibility that is dangerous and is real.

There are times in our history when the Supreme Court loses sight of the Constitution and that people need to reaffirm their commitment to American traditions and values by amending the Constitution. It happened in the first few years of our history. It happened again with the 13th, 14th and 15th amendments after the Civil War and it is needed now. It is time to recapture the Constitution and the flag amendment is a good place to start.

The flag amendment actually is an exercise in strengthening the base for the first amendment itself. The Framers knew that unless the kind of liberty that the first amendment protects was accompanied by responsibility, anarchy would result. And they knew also that anarchy inevitably results in tyranny. The Framers were worried that anarchic tendencies in the early years of our republic threatened the peace and prosperity of the Nation. The Federal Constitution itself was the result.

We have the same problem again. We have not reached the point of anarchy in this country yet but we have begun again to come dangerously close. We need to do more to protect our fundamental freedoms by encouraging responsibility and restraint. The flag amendment is a small step in restoring the basics of American civilization itself.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Professor Presser. We appreciate your testimony.

[The prepared statement of Mr. Presser follows:]

PREPARED STATEMENT OF STEPHEN B. PRESSER, RAUL BERGER PROFESSOR OF  
LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

My name is Stephen Presser, I am the Raoul Berger Professor of legal history at Northwestern University School of Law, and I appear before you today in order to testify in support of the Flag Protection Amendment, H.J. Res. 79. This is my first appearance before a House Committee in support of the Amendment, but I twice testified before the Senate Judiciary Committee when the Amendment was last before the Congress, and since many of the arguments I made then in favor of the Amendment are still valid, I hope you may refer back to that testimony for clarification and amplification of my views.

My goal today is briefly to indicate the persuasive arguments in favor of the Amendment, and to address some of the objections that were raised six years ago, and are still being raised against the Amendment. You will be hearing from a representative of the American Legion, and from other proponents of the Amendment who will be more eloquent in its support than I will be, and who will address their special feeling for the American flag and the need to protect it from desecration. This is also evident, of course, from the fact that the Amendment has garnered so many sponsors in the House and Senate and has been the subject of favorable resolutions in 49 state legislatures. I believe I can best serve the Committee by making some comments about the legal background that gives rise to a need for the Amendment, and by addressing the general arguments of legal scholars and commentators who have criticized this Amendment effort.

#### I. THE NEED FOR THE FLAG PROTECTION AMENDMENT

First a bit of the relevant legal history. The need for the Amendment was first suggested by the Supreme Court's surprising decision in *Texas v. Johnson* (1989), where, by a bare five to four majority, the court declared that flag-burning was speech protected by the First Amendment, and could not be banned by the federal government or by state legislatures. The court's opinion, perhaps, should not have been as surprising as it was, because it was simply the last in a long line of cases that had held that conduct "imbued with speech" had to be regarded as speech itself. This particular decision was too much for the four dissenters, however, and for many Americans, who thought that the defendant Gregory Johnson's conduct (incinerating the flag after repeatedly chanting "Red White and Blue, we spit on you") was an outrageous act of arson, and not the kind of speech James Madison had in mind when he and his colleagues were drafting what became the First Amendment.

Chief Justice Rehnquist, writing for the dissenters, wondered how legislation prohibiting flag desecration that had been on the books in most states for decades, without objection, could have suddenly become impermissible. Rehnquist, after observing that several of the Court's greatest champions of civil rights, including Hugo Black and Earl Warren thought that the flag could be protected from desecration, noted that the protection of the national symbol ought to be entitled to Constitutionality, as a matter of common sense, perhaps, rather than as a matter of sophisticated First Amendment jurisprudence.

But common sense is now too often in short supply in Constitutional discourse. The obvious, it would seem, now has to be embarrassed in the academy and in the courts, where gorgeous subtleties and refined analysis cloaked in balancing tests and multi-level tiers of scrutiny to conceal result-oriented reasoning too frequently carry the day. Following *Texas v. Johnson*, in a wave of public outrage, the Congress passed a statute forbidding flag desecration, drafted in neutral language, in order to seem as not to be attacking speech. Several leading constitutional scholars, most prominently Lawrence Friedman of Harvard, had advised Congress that a statute could solve the problem, and that the First Amendment and statutory flag protection could co-exist. Several of us told the Congress that only an Amendment could authorize flag desecration statutes, given the Court's notions about conduct "imbued with speech," and we were proved right when the Supreme Court rather summarily found the new statute unconstitutional. The proponents of the Amendment once again sought help from Congress, only to suffer defeat as the Amendment failed to garner the necessary two thirds majority in the House. The Amendment effort then returned to the grass roots, and its proponents redoubled their efforts.

#### II. THE ARGUMENTS IN FAVOR OF THE AMENDMENT

Why then am I for this Amendment, when the Supreme Court has twice rejected the constitutionality of flag desecration, when many members of the legal academy, and many commentators in the media probably remain opposed to it, and when the requisite majority could not be found in the House or Senate five years ago? Why do I reject the view of those who claimed then that the Flag Protection Amendment was an attempt to infringe our precious First Amendment freedoms? First, I believe that since until six years ago it was widely believed that the First Amendment could properly be construed to allow the punishment of flag desecration, and since that view has only been overturned by the slimmest of transient majorities on the Supreme Court, widespread public opinion, expressed in the desire for a Constitutional Amendment, ought to be relevant in defining the nature of our First Amendment freedoms. If the American people (as indicated by the favorable resolutions in forty-nine state legislatures) feel that there is a difference between pure political speech (which the First Amendment incontrovertibly protects) and intentionally outrageous acts of arson (which I believe it does not), that feeling deserves deference, and a

Constitutional Amendment is the proper manner in which that deference ought to be expressed.

To put this another way, the current Flag Protection Amendment effort is a vital exercise in participatory democracy, in popular sovereignty, and is deserving of support for that reason alone. Popular sovereignty is the basis of our Constitutional system, and Article V, which authorizes the Amendment process, recognizes this. Where the Supreme Court has misconstrued the Constitution, the Amendment process allows the people to correct the Court's error, as was done, for example, by the Fourteenth Amendment, perhaps the most important provision in current Constitutional jurisprudence.

There is another manner in which the Flag Protection Amendment effort can be seen as a necessary corrective, and this brings me to what I believe is the most important reason the Amendment ought to have the support of Constitutional scholars, and deserves passage. I believe that the Flag Protection Amendment is a small but vital step in returning us to a Constitutional path from which we have wrongly strayed, and in redressing a delicate Constitutional balance that has become dangerously skewed.

### III. A DELICATE BALANCE OF PHILOSOPHIES AND PURPOSES

Our Framers understood that there were two important elements to our Constitutional tradition which we inherited from great Britain—a liberty element and a responsibility element. Without the liberty guaranteed to us by the English Common law we often said at the time of the Revolution, we would be slaves, and no better than the subjects of some Asiatic potentate. Without liberty we could not hope to realize the aspirations toward religious freedom and republican government for which the United States was colonized and then, later, declared independent. But the framers also realized that without responsibility, without order, without submission to the rule of law, there could be no protection for life, limb and property, there could be no lasting liberty. The Federal Constitution itself was drafted and adopted following the failure of the state legislatures to understand that more responsibility was needed, and that we could not enjoy the blessings of liberty without security to person and property.

To make this same point in a manner heard more generally today, it was one of the goals of the Constitution's framers to foster a sense of community among all the citizens of our republic, to secure a certain baseline of civilized behavior. It is the recognition of this goal, by the way, that has always permitted reasonable time place and manner restrictions on even the speech protected by the First Amendment. The proposed Flag Protection Amendment is quite consistent with such restrictions. The message that flag burners might seek to convey—that we ought to destroy the symbols that hold us together—can still be conveyed by pure speech, of course, but one particular incendiary manner of conveying that speech would be restricted, in the interest of other Constitutional goals. It would still be true that our First Amendment jurisprudence would be marked by a tolerance for the expression of dissenting or even despised views, but not necessarily by a tolerance for intentionally inflammatory actions.

As I sought to explain when I testified before the Senate Judiciary Committee five years ago, many of our judges, and the majority of the Supreme Court in the two flag decisions in particular appear to have gone too far in embracing an individualistic constitutional jurisprudence, and to have forgotten other elements in our political and constitutional tradition. The framers of the Constitution and the Bill of Rights were not a group of late 18th century John Stuart Mills, devoted solely to maximizing opportunities for the expression of individual lifestyles. They adhered to a nearly bewildering number of governmental philosophies, chief among them what we now call classical republicanism, which was characterized by an emphasis on individual restraint, altruism and civic virtue.

Included also among the framers, of course, were a bevy of Hobbesians who believed in the need for a strong central government to protect us from our baser instincts. Included as well were a number of evangelical theorists who sought to preserve a strong role for religion and morality in American life. There were also adherents to the Scottish Enlightenment and to the new market theories of Adam Smith. Finally, there were a number of Lockians, committed to the protection of what they took to be individuals' rights to life, liberty, property, and the pursuit of happiness.

It is not too much to say that it was the genius of our Constitution and of much of our political history that we usually managed successfully to juggle our competing basic philosophies, to grant more individual freedom than was available in any other country, but to balance it by community-centered restraints, in order to achieve what we call ordered liberty, to protect one's security of person and prop-

erty, but to allow one to enjoy enough independence to realize one's particular calling in the community.

Thus, if there is a single message I've understood from twenty-one years teaching and writing about our laws and Constitution, it is that each time we move too far in one direction, towards unlimited liberty, or toward too restrictive order, there is a reaction, and sometimes a violent one. In recent years we have been living through a period in which this delicate balance of constitutional philosophies and purposes has gone awry. We are at a point where the personal liberty element of our tradition has, in effect, spun out of Constitutional control. For at least the last forty years, our constitutional law has been radically reconceived as concerned only with the gratification of individual desires, and the expansion of individual license.

The erroneous notion that our basic constitutional philosophy is individual self actualization has led too many courts to misconstrue the constitution and to forget the need for community responsibility and self-restraint. This kind of constitutionalism makes the First Amendment and the Fourteenth Amendment into tails wagging the whole constitutional dog, and improperly uses the Bill of Rights as a club to beat back the perfectly proper governmental exercise of powers by the states.

#### IV. CONSEQUENCES OF CONSTITUTIONAL IMBALANCE

Ideas or the failure to remember ideas have consequences. I don't think it goes too far to say that recent events in America such as the riots following the first Rodney King trial, the explosion in the birth of children born out of wedlock, the increase in mindless and random acts of violence, even the recent Oklahoma city bombing are products of our failure, as a Constitutional society, to remember that with individual liberty ought to come basic decency and responsibility.

The Supreme Court's decisions regarding flag burning didn't create these problems, although I have argued in my recent book *Recapturing the Constitution: Race, Religion and Abortion Reconsidered* (Regnery Publishing, 1994) that other decisions of the courts, regarding matters of race, religion, and abortion, for example, did play an important role in creating the current climate of fear, criminal irresponsibility and spiritual and moral decay. Nevertheless, in the *Texas v. Johnson* case the five Justices in the majority, I think, were guilty of failing to be able to distinguish between the kind of liberty of speech which needs to be protected in a republic, and the kind of irresponsible and outrageous acts of arson which do not.

The Flag Protection Amendment does no more than return us to an understanding that we had as recently as six years ago: That our traditions allow for a maximum of free expression, and full freedom of speech, but that our traditions also demand that the exercise of our rights be done in a matter that accords with our responsibilities. I don't mean by this, that I think the welfare of the Republic is threatened by platoons of potential flag burners, and I think it's important to realize that I'm not motivated by a Spanish-inquisition-type zeal to punish flag burners.

I am motivated by the desire expressed by the so-called Tenth Amendment movement, a desire to Recapture the community's right to set standards of responsibility and decency, and to guarantee that there are some things that are even more important than individual self-actualization. We have no national religion, nor do we have many coherent tangible symbols of our traditions of liberty under law, of liberty with responsibility. The flag may be the only such symbol we possess, and if we, as a community do not have the right to preserve that symbol in a manner that expresses the responsibility and decency that are necessary for civility and popular sovereignty itself, than it is not likely that our republic will long endure.

#### V. A CONSTITUTIONAL CROSSROADS

We are now at an important Constitutional, political, and social crossroads. The events in Europe in 1989, and the events here last November have suggested that much of what passed for wisdom in the American media and even in the American legal academy was simply foolishness or worse. Even the Supreme Court has recently shown signs of recapturing the Constitution, as the recent decision in the *Lopez* case, for the first time since the New Deal, reasserted the primacy of popular sovereignty in the states, and reminded us that the federal government is one of limited and enumerated powers.

We are on the brink of recapturing the constitution itself, and I think the Flag Amendment is a good means with which to start. Still, some of the Flag Protection Amendment's critics have suggested that to pass this Amendment would amount to "trivializing the Constitution." They reach this conclusion- because they assert that the number of potential flag burners are few, it is more appropriate that they be pitied rather than punished, and flag burning itself represents no threat to the stability of the republic. Other critics continue to maintain that to pass the Flag Pro-



tection Amendment would be dangerously to amend the First Amendment and the Bill of Rights itself. How might one respond to these criticisms?

To address the trivialization point first. It is not the fate of individual flag burners that is at stake here; the Flag Protection Amendment is more properly viewed as a question of the continued nature of the American political and social community itself. Nothing could be more important than the right of the people to express our tradition of guaranteeing the responsibility that comes with liberty. Far from being a threat to the First Amendment and the Bill of Rights, the baseline of decency, civility, responsibility and order that the Flag Protection Amendment is designed to supply is what makes the exercise of our fundamental freedoms possible. As the Framers understood and often observed, liberty without order or without responsibility soon becomes anarchy, and anarchy is inevitably followed by repression and tyranny. We have not reached the fatal point of anarchy yet in America, but we have come disturbingly close. It is time for some responsibility, not to attack, but to protect the First Amendment, and our other freedoms. The Flag Protection Amendment does nothing to infringe the First Amendment. It does not forbid the expression of ideas, nor does it foreclose dissent. It merely allows the people to reassert their right to shape the contours of political development in the country and to reconstruct a dangerously fractured sense of community.

Mr. CANADY. Next we will recognize Mr. Clint Bolick. I will note that Mr. Bolick will also be with us tomorrow.

#### **STATEMENT OF CLINT BOLICK, VICE PRESIDENT AND LITIGATION DIRECTOR, INSTITUTE FOR JUSTICE**

Mr. BOLICK. Yes, Mr. Chairman. There is an anomalous situation in that I am a witness for the minority this morning and will be a witness for the majority tomorrow, so that if all goes well, I will have irritated every Member of this panel by the close of business tomorrow.

Thank you for the invitation. I am Clint Bolick, litigation director at the Institute for Justice. I want to mention at the outset that I am a red meat eating Republican and yet I am here to testify against the proposed amendment.

It is because I am a Republican that I believe in freedom. I am not here, of course, to defend flag desecration but to urge Members of this body whom I share basic principles and values against committing a far more regrettable act than flag desecration, and that is constitutional desecration.

I can well understand the sentiments behind the proposed amendment. Indeed, I have a strong visceral reaction against even the mere image of flag-burning. If I saw someone burning an American flag, I would do anything I could to rescue it. The reason I would do so is that, for me, the Stars and Stripes symbolize the freest Nation on Earth, in fact, the first Nation in history to establish the principle that individuals are sovereign and that Government exists to protect their rights.

For more than 200 years, our flag and our Nation have been a beacon of freedom for oppressed people the world over and it is freedom of expression that distinguishes our free society from all authoritarian regimes the world over. We tolerate even what we abhor.

This Nation early in its existence enacted the alien and sedition acts forbidding libelous expressions against the State. Triumphant, we long ago put that grim episode behind us embracing ever since the proposition that the hallmark of a free society is toleration of dissent. Indeed, it is our visceral reaction to flag desecration that makes it absolutely essential that we protect it.

The reason we react is because the act conveys in the most powerful terms the ultimate statement of political expression, and that is profound disdain for the Nation or for its Government. I don't agree with that but I agree with the right to say it. Even those constitutional scholars who take the narrowest view of the first amendment acknowledge that its cornerstone is political expression which the Government may not abridge on account of its content, yet it is precisely political expression on the basis of its content that this amendment seeks to suppress. We would not be here if there was not a powerful message being conveyed.

Someone responded that freedom of expression does not encompass symbolic speech. For a Nation whose genesis came not just in the political acts of the founding era but in the Boston Tea Party, I wonder how anyone can diminish the importance of symbolic speech. When Rosa Parks refused to move from her seat in the white section of a public bus years ago, her courage inspired a civil rights revolution that provoked our Nation to make good on the promise of equality under law.

At Tiananmen Square, a solitary hero stood in the path of tanks, a silent act of civil disobedience that spoke more eloquently about freedom and suppression than any words can convey. I remember a few years ago when Alex Kozinski, a judge on the U.S. Court of Appeals for the Ninth Circuit appeared at a Federalist Society banquet carrying a bag that contained a desecrated flag.

Judge Kozinski announced to the shocked gathering that he himself had mutilated the flag. He dramatically removed it from the bag, revealing a flag from his native Communist Romania from which he had fled many years earlier with his family with the hammer and sickle torn out of it, an act of symbolic political expression, one that all free people would applaud, an act that a totalitarian dictatorship would punish severely but a truly free society must not.

To people who so hate America that they are driven to burn our flag, we have two possible responses. We can lock them up, make them martyrs to their pathetic causes and possibly induce further and more harmful antisocial acts or we can demonstrate by tolerating their expression the true greatness of our Republic.

As the Supreme Court declared in *Texas v. Johnson*, we can imagine no more appropriate response to burning a flag than by waving one's own. I urge my friends on this committee, please consider the basic principles that animate you and all that you do and apply those principles to protect freedom of expression even in a form that we all may find very offensive.

Thank you so much for having me.

Mr. CANADY. Thank you.

[The prepared statement of Mr. Bolick follows:]

PREPARED STATEMENT OF CLINT BOLICK, VICE PRESIDENT AND LITIGATION  
DIRECTOR, INSTITUTE FOR JUSTICE

Mr. Chairman and members of the Committee, thank you for inviting me to testify on the issue of a constitutional amendment to allow Congress and the states to prohibit flag desecration. I speak on behalf of the Institute for Justice, a public interest law center dedicated to protecting fundamental individual rights; and as a member of the Emergency Committee to Defend the First Amendment, whose roster includes some of the nation's most respected constitutional scholars, both liberal and conservative.

I am not here to defend flag desecration, of course, but to urge members of this body with whom I share basic principles and values against committing a far more regrettable act: constitutional desecration.

I can well understand the sentiments behind the proposed amendment. Indeed, I have a strong visceral reaction even to the mere image of flag desecration. If I saw someone burning an American flag, I would do anything I could to rescue it. The reason I would do so is that for me the stars and stripes symbolize the freest nation on earth—in fact, the first nation in history to establish the principle that individuals are sovereign, and that government exists to protect their rights. For more than 200 years, our flag, and our nation, have been a beacon of freedom for oppressed people the world over.

And it is freedom of expression that distinguishes our free society from all authoritarian regimes. We tolerate even what we abhor. This nation early in its existence enacted the Alien and Sedition Acts, forbidding libelous expressions against the state. Triumphantlly we long ago put that grim episode behind us, embracing ever since the proposition that the hallmark of a free society is toleration of dissent.

Indeed, it is our visceral reaction to flag desecration that makes it absolutely essential that we protect it. The reason we react is because the act conveys in the most powerful terms the ultimate statement of political expression: profound disdain for the nation or its government. Even those constitutional scholars who take the narrowest view of the First Amendment acknowledge that its cornerstone is political expression, which the government may not abridge on account of its content. Yet it is precisely political expression, on the basis of its content, that this amendment seeks to suppress.

Some would respond that freedom of expression does not encompass symbolic speech. For a nation whose genesis came not just in the political tracts of the founding era but in the Boston Tea Party, I wonder how anyone can diminish the importance of symbolic speech. When Rosa Parks refused to rise from her seat in the white section of a public bus a generation ago, her courage inspired a revolution that provoked our nation to make good on its promise of equality under law. At Tiananmen Square a few years ago, a solitary hero stood in the path of tanks, a silent act of civil disobedience that spoke more eloquently about freedom and suppression than any words could convey.

I remember a few years ago when Alex Kozinski, a judge on the U.S. Court of Appeals for the Ninth Circuit, showed up with a bag containing a desecrated flag at, of all places, a federalist Society banquet. Judge Kozinski announced to the shocked gathering that he himself had mutilated the flag. He dramatically removed it from the bag, revealing a flag from Communist Rumania, from which his family had fled years earlier, with the hammer and sickle torn out of it. An act of symbolic political expression—one that all free people would applaud. An act that a totalitarian dictatorship would punish severely, but a truly free society does not.

Though of course most Americans would empathize with these particular expressions while disdaining desecration of the American flag, the point is that all are symbolic expressions against the state. We cannot on a principled basis pick and choose which we will permit and which we will prohibit. For once we have sanctioned an exception to the absolute principle embodied in the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—we will have established the proposition that we may suppress whatever a large majority of us find repugnant. By what perverse principle will we have a society in which burning a flag is forbidden, but in which burning a cross is permitted?

But, the proponents will respond, it is the right of Americans to amend their Constitution. I would correct the proponents on this point: as to restraints on freedom of expression, it may be in their power but it is not their right. I take it that many of the proponents of this measure agree with me that the Constitution does not create rights, it merely recognizes and protects rights that exist by virtue of man's nature. There are some rights so essential that no government may rightfully take them away. The founders referred to these as "inalienable" rights. It is the first purpose of government to protect these rights, and no majority, no matter how large or determined, may infringe these rights. That freedom of speech is foremost among these rights is underscored by the fact that the framers placed it first among the Bill of Rights.

Though the focus of any debate on this subject should be the rights in question, there is of course a utilitarian dimension to the argument. Advocates of free speech always have recognized that when outlets of expression are suppressed, those who want to express themselves will find other ways to do so. In this way free speech provides a safety valve. When someone burns a flag, it may make us very angry—that is precisely its point—but it does not harm people or property.

To people who so hate America that they are driven to burn our flag, we have two possible responses. We can lock them up, make them martyrs to their causes, and possibly induce further and more harmful antisocial acts. Or we can demonstrate, by tolerating their expression, the true greatness of our republic. As the Supreme Court declared in *Texas v. Johnson*, "We can imagine no more appropriate response to burning a flag than by waving one's own. . . . We do not consecrate the flag by punishing its desecration, for in so doing we dilute the freedom that this cherished emblem represents."

There are many elected officials among the proponents of this amendment who place a paramount value on freedom. I urge them to reconsider their support for this proposal. This amendment is anti-freedom. It does more to diminish our flag and our Constitution than any number of pathetic flag-burning zealots. In the cause of freedom for which our flag proudly waves, I respectfully urge this Committee to affirm the inalienable right of free expression and to reject the proposed amendment.

Thank you for allowing me to share these views.

Mr. CANADY. Our next witness is Mrs. Rose Lee.

### **STATEMENT OF ROSE E. LEE, PAST NATIONAL PRESIDENT, GOLD STAR WIVES OF AMERICA**

Mrs. LEE. Thank you, Mr. Chairman and distinguished members of the subcommittee. It is an honor to be here today representing 10,000 American women who share a personal and heartfelt belief in the American flag.

My name is Rose Lee and I am the past national president of Gold Star Wives of America. You might say that the Gold Star Wives are the women who were left behind by those who died serving our country. We are the widows of those American servicemen who died on active duty, killed in action or died later of service-connected disabilities.

Our organization was founded 50 years ago by a young World War II widow who felt alone and in need of support and thus Gold Star Wives was started. Needless to say, we are a very patriotic group and believe strongly in the words and ideals contained in the Constitution of the United States. In fact, first among the purposes of the Gold Star Wives is to assist in upholding the Constitution and laws of the United States and to instill a sense of individual obligation to community, the State, and Nation.

At our national convention last year, Gold Star Wives unanimously passed a resolution to support a constitutional amendment protecting the U.S. flag from deliberate acts of physical desecration. We added our voice and our volunteer spirit to the Citizens Flag Alliance, the national, nonpartisan grassroots organization working for the amendment's passage.

I am indeed proud to be here today to speak in support of that amendment. This flag, my flag, our flag—it means something different to each and every American. But to the Gold Star Wives, it has the most personal of meanings. Twenty-three years ago, this American flag covered the casket of my husband, Chew-Mon Lee, U.S. Army. He was a decorated combat veteran of the Korean War. He has received two Purple Hearts. He also received the Army's second highest award, the Distinguished Service Cross for extraordinary heroism in military operations against an armed enemy.

He also served in Vietnam. He died on active duty on Taiwan and he is buried in Arlington National Cemetery. Every Gold Star Wife has a flag like this one folded neatly in a triangle and kept in a very special place.

It is not fair and it is not right that flags like this flag handed to me by an honor guard 23 years ago can be legally burned by someone in this country. My husband defended this flag during his life. When he died, it was an honor to have this flag cover his casket. But it is a dishonor to our husbands and an insult to their widows to allow this flag to be legally burned. The flag is a symbol that stands for the freedoms we enjoy as Americans.

My husband fought for those freedoms, including one we hear a lot about in this debate: Freedom of speech. The Gold Star Wives believe that free speech is one of our Nation's most important ideals. Our country is a marketplace of many voices and ideas, most of them useful, some of them hurtful. Under our Constitution, you can say anything you want against the flag or against the United States, but burning the flag is not an expression of free speech. It is a terrible physical act. It is a slap in the face to every widow who has a flag just like mine.

Although I grew up in California, I live in this area now and often drive by the powerful Iwo Jima Marine Memorial. It depicts our servicemen so valiantly and proudly raising the flag in a turning point of the war against tyranny and aggression. What a shame it is to permit the desecration of that flag. What an important and meaningful step it would be to make protection of that flag part of our Constitution.

The Gold Star Wives would welcome the day when organizations like ours would no longer be needed, no more wars, no more military widows, but until that day arrives, the Gold Star Wives will be here, each with her own flag, defended with courage, presented with gratitude, accepted with pride.

I urge you to give this flag the protection it so richly deserves. Thank you.

MR. CANADY. Thank you, Mrs. Lee. We appreciate your testimony.

[The prepared statement of Mrs. Lee follows:]

PREPARED STATEMENT OF ROSE E. LEE, PAST NATIONAL PRESIDENT, GOLD STAR WIVES OF AMERICA

Mr. Chairman and distinguished members of the subcommittee. It's an honor to be here today representing 10,000 American women who share a personal and heartfelt belief in the American flag.

My name is Rose Lee and I'm the past national president of the Gold Star Wives of America. You might say the Gold Star Wives are the women left behind by those who died serving our country. We're the widows of American servicemen who died on active duty, were killed in action, or died later in life from service-connected disabilities. Our organization was founded exactly fifty years ago by a young World War II widow who felt alone and in need of support from other women who shared the same experience.

But let me assure you the Gold Star Wives offer more than a shoulder to cry on, although that is always available. We're currently fighting to make sure widows have the compensation rights and other benefits they're entitled to by virtue of the service their late husbands performed for this country. Needless to say we're a very patriotic group and believe strongly in the words and ideals contained in the Constitution of the United States. In fact, first among the purposes of the Gold Star Wives is to assist in upholding the Constitution and laws of the United States, and to instill a sense of individual obligation to the community, the state and the nation.

At our national convention last year, the Gold Star Wives unanimously passed a resolution to support a constitutional amendment protecting the U.S. flag from deliberate acts of physical desecration. We added our voice and our volunteer spirit to the Citizens Flag Alliance, the national, non-partisan grassroots organization



working for the amendment's passage. I'm proud to be here today to speak in support of that amendment.

The flag means something different to each and every American. But to the Gold Star Wives it has the most personal of meanings. Twenty-three years ago this American flag covered the casket of my husband, Chew-Mon Lee, United States Army. He was a decorated combat veteran wounded in the Korean War. For his service in Korea he received the Army's second-highest award, the Distinguished Service Cross, for extraordinary heroism in military operations against an armed enemy. He also served as a staff officer in the Vietnam War. And like all of us in this room he was a proud and patriotic American. He died on active duty while stationed on Taiwan, and is buried at Arlington National Cemetery.

Every Gold Star Wife has a flag like this one, folded neatly in a triangle and kept in a special place. It's not fair and it's not right that this flag, handed to me by an Honor Guard twenty-three years ago, can be legally burned by someone in this country. My husband defended this flag during his life. When he died it was an honor to have this flag cover his casket. But it's a dishonor to our husbands and an insult to their widows to allow this flag to be legally burned.

In a certain sense I'm here today to finish the uncompleted mission of Chew-Mon Lee, to defend in my own way the flag he defended so bravely throughout his military career.

The flag is a symbol that stands for the freedoms we enjoy as Americans. My husband fought for those freedoms, including one we hear a lot about in this debate, freedom of speech. The Gold Star Wives believe that free speech is one of our nation's most important ideals. Our country is a marketplace of many voices and ideas, most of them useful, some of them hurtful. Under our Constitution you can say anything you want against the flag or against the United States. But burning the flag is not an expression of free speech. It's a terrible physical act. And it's a slap in the face of every widow who has a flag just like mine.

I'd like to speak briefly about what this flag symbolizes to me. My parents arrived in this country from China in the early 1920s. My mother was pregnant at the time with their first child, a son, one of six sons she would have. And all six would eventually serve in the armed forces of the United States. Like many people who come from other lands, coming to the United States was a big step for my parents. But they were proud to become Americans, proud of the opportunities this great country offered. My mother expressed that pride by displaying an American flag in our home each and every day. In a land that welcomes diverse people, the flag in our home represented that wonderful diversity.

But the flag means something different to each of us. We each look at the flag and see something personal reflected there. To some it stands for strength. To others it stands for justice. To my parents it meant diversity and opportunity. To me the flag has come to mean freedom and courage, the freedom we enjoy as Americans and the courage of the men and women who defend those freedoms. I have tried to honor those ideals by flying the flag outside my home on national holidays, especially Memorial Day, Flag Day and Veterans Day. And each day for the past twenty-three years I have kept this flag, the flag from my husband's casket, close at hand.

Although I grew up in California, I live in this area now and often drive past the powerful Iwo Jima Marine Memorial. It depicts our servicemen so valiantly and proudly raising the flag in a turning point of the war against tyranny and aggression. What a shame it is to permit the desecration of that flag. What an important and meaningful step it would be to make protection of that flag part of our Constitution.

The Gold Star Wives would welcome the day when organizations like ours would no longer be needed—no more wars, no more military widows. But until that day arrives, the Gold Star Wives will be here, each with her own flag, defended with courage, presented with gratitude, accepted with pride.

I urge you to give this flag the protection it so richly deserves. Thank you.

Mr. CANADY. Our final witness on this panel is Mr. William Detweiler.

#### STATEMENT OF WILLIAM DETWEILER, NATIONAL COMMANDER, THE AMERICAN LEGION

Mr. DETWEILER. Mr. Chairman and members of the subcommittee. Thank you, Mr. Chairman, for the opportunity to testify in support of the constitutional amendment prohibiting the physical desecration of the U.S. flag.

The 4 million men and women of the American Legion, the American Legion Auxiliary and the Sons of the American Legion are resolute in their conviction to see that the will of the majority of the Americans is honored and that this amendment becomes part of our Constitution.

Mr. Chairman, we are perched today on the crest of the proverbial slippery slope. We were placed here by a decision of the Supreme Court which Justice John Paul Stephens recently called one of the most difficult that he has had to make while on the Court. The Court could have searched long and hard and never found a decision that more clearly refuted American values. This was not speech. It was an inarticulate, vile and repugnant act. At a time when the world was rapidly changing, the Court chose to pull away the anchor that held our patriotic views in place.

If the Court could find in the Constitution the power to stop a citizen from yelling "fire" in a crowded theater, how could it overlook the accepted precedence which outlawed this violent and loathsome act?

Following the Supreme Court decision in *Texas v. Johnson* in 1989, which effectively wiped out 100 years of flag protection legislation, the American Legion and its auxiliary, along with the Sons of the American Legion, began a quiet grassroots effort to seek memorializing resolutions from the various State legislatures, calling on Congress to pass an amendment to the U.S. Constitution to protect the American flag from physical desecration. In essence, we began a movement to participate in democracy. Since that time, 49 States have passed such a resolution.

Knowing this to be an American issue, not a veterans' issue, not a Democratic or a Republican issue, the American Legion formed the Citizens Flag Alliance. Today the grassroots organization numbers more than 100 organizations of very diverse groups.

For the last 5 years, national polls by the Gallup organization have consistently shown that four out of five Americans support the amendment. As late as March of this year, the Gallup poll run at that time reflected the same sentiment. At the same time, 76 percent of the people polled did not believe that the passage of such an amendment would in any way affect their right to free speech.

Here in Washington, I have heard some say that they thought that this issue was dead. Well, I assure you that the issue is far from dead. In the last several months of this year, the first part of 1995, four States have passed memorializing resolutions. In the last 3 years, I have had the opportunity to travel across America speaking and discussing the issue with people from all walks of life.

The overwhelming majority want the Congress to enact this amendment and return it to the States for ratification. This united call by the legislatures of this country is a monumental historic event. Never before in our Nation's history have the State legislatures been so united in calling for an amendment to be sent back to them for ratification. Again, a request for participation in a democratic process.

The American people have expressed their desire to participate in the democratic process outlined in article V of the U.S. Constitution. The American flag is the one unifying symbol that binds us

altogether as a people. This amendment does not prohibit, it does not mandate. It merely enables the American people to enjoy a freedom that they had for 100 years, the right to enact flag protection legislation.

The people are asking this Congress to give them the opportunity to protect their flag through ratification of this amendment. We are perched on a slope, Mr. Chairman, and every time we deny our heritage, every time we disavow who we are and what we stand for, we slip lower and lower. The flag stands with honor in our houses of worship because it is a symbol of our religious freedom. It waves over our schools as a testament to our heritage and freedom of opportunity.

The flag lies over our State—flies over our State houses and Federal buildings as testimony of our representative form of government. It is planted in the Sea of Tranquility as a monument to our leadership and perseverance as a united people. And it flies from the front porches of our homes as a reminder that we are free today because of those who paid the dear price throughout our yesterdays.

Mr. Chairman, even with this wide-ranging, diverse group of grassroots support, this issue would not resolve itself. The Supreme Court's decision can only be reversed by the Congress sending to the States this amendment which manifests the will of the people who are stirred to action. Desecration of our Nation's banner is an evil act yet, as a wise man once observed, the only thing necessary for the triumph of evil is for good men to do nothing.

I urge this committee to act in the best interests of all Americans, past, present, and future, and to pass this amendment.

Thank you.

Mr. CANADY. Thank you, Mr. Detweiler.

[The prepared statement of Mr. Detweiler follows:]

PREPARED STATEMENT OF WILLIAM DETWEILER, NATIONAL COMMANDER, THE  
AMERICAN LEGION

Mr. Chairman and Members of the Subcommittee, thank you Mr. Chairman for the opportunity to testify in support of a Constitutional amendment prohibiting the physical desecration of the United States flag. The four million men and women of The American Legion, The American Legion Auxiliary and The Sons of The American Legion are resolute in their conviction to see that the will of the majority of Americans is honored and that this amendment becomes part of our Constitution.

Mr. Chairman, we are perched today on the crest of the proverbial slippery slope. We were placed here by a decision of the Supreme Court which Justice John Paul Stevens recently called one of the most difficult he has made while on the court.

It all began when Gregory Lee Johnson carved out his own tawdry place in history by instigating what must have appeared at the time a minor challenge to the one symbol of our nation that unites us all—the American flag. Who could have foreseen what followed.

In Dallas, where the Republican National Convention was being held in 1984, Johnson burned the United States flag while he and fellow demonstrators chanted, "America, the red, white and blue, we spit on you!" At the time, it seemed certain that he would be convicted and punished in proportion to the offense he committed.

When the state of Texas prosecuted him for flag desecration, Johnson did not hesitate to drape himself in the same flag he had burned as he sought protection under the law it symbolizes. Common sense should have dictated that 100 years of tradition, and more than eight decades of law which placed the flag in a position of honor, would prevail. But eventually the Supreme Court heard the *Texas vs. Johnson* case, and in a 5-4 decision ruled that desecration of the flag was a form of political expression permissible under the freedom of speech clause of the First Amendment.

The court could have searched long and hard and never found a decision that more clearly refuted American values. This was not speech. It was an inarticulate, vile and repugnant act. At a time when the world was rapidly changing, the court chose to pull away the anchor which held our patriotic values in place. If the court could find in the Constitution the power to stop a citizen from yelling "fire" in a crowded theater, how could it overlook the accepted precedents which outlawed this violent, loathsome act.

Surely, neither our Founding Fathers, nor members of Congress, nor anyone in the history of our republic ever intended that burning the flag that has been draped on the caskets of those who died to preserve the freedoms it represents, would be an act which the Constitution would protect.

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Eloquent in its simplicity, this first article of our Bill of Rights set forth "unalienable rights" never before guaranteed to a nation's people. Surely when they had finished writing, the authors looked upon their work with a certain sense of pride, for even the most common of people would have no difficulty understanding their rights.

As I now re-read this basic document of human dignity and ponder the body of law that has sprung up around it, I ask myself, in the name of all that our nation stands for, how could our highest court interpret these words to approve burning our nation's flag? How could the court decide that an act which divides us was superior to a common standard of conduct that unites us.

We are a nation born of immigrants, many of whom came to America with only scant knowledge of our heritage and our history. Whether they docked at Ellis Island eighty years ago or landed in Miami yesterday, one of the first sights they beheld was Old Glory waving proudly in the air. It was the embodiment of all of their hopes for a better tomorrow. Although it was not the flag of their fathers, they knew it would be the flag of their children, and of their children's children.

They knew it was the flag of a nation that might not be perfect, but it was the banner of a good nation that then, and now, strives for equal justice and opportunity for all. It is their flag—not the battle colors of a king or the banner of a dictator—it is the flag of the people.

Today's generation may not value the flag of the people as much as generations past. In today's world where democracy is flourishing and peace is more often the state of affairs than war, it is easy to forget that a flag which stands for liberty was once a rarity. Perhaps that is exactly why this amendment is necessary.

We are perched on a slope, Mr. Chairman, and every time we deny our heritage, every time we disavow who we are and what we stand for, we slip a bit lower. The flag stands with honor in our houses of worship because it is a symbol of our religious freedom. It waves over our schools as a testament to our heritage and freedom of opportunity. The flag flies over our state houses and federal buildings as testimony to our representative form of government. It is planted in the Sea of Tranquility as a monument to our leadership and perseverance as a united people. And it flies from the front porch of our homes as a reminder that we are free today because of those who paid a dear price throughout all of our yesterdays. Those values, and so much more, are the essence of the flag.

The Constitution is a living document that has served as a beacon through peace and war, prosperity and diversity, internal strife and foreign challenge. This amendment will guide Americans of the future to the values that unite us and make us the greatest nation on the face of the earth.

Is there an argument that could persuade anyone that it is acceptable to tear a flag from its staff, douse it with lighter fluid, spit on it, curse it and burn it? What logic could ever prevail to prove that a violent, inarticulate act such as burning the symbol of our liberty is an expression of free speech protected by the Constitution? No argument, Mr. Chairman, no logic will ever make burning the American flag right.

We slide further down the slippery slope, if we tell generations to come that the desecration of the flag is unimportant. I am confident, however, that Congress will pass this amendment to recognize the rights of the millions who revere our flag and deeply oppose the destruction of this primary symbol of our American freedom.

Tens of thousands of brave, selfless American men and women have died to protect our flag from desecration at the hand of our enemies. But you don't have to be a veteran to understand what the American flag means, to understand that the symbols of our freedom deserve to be protected.

Mr. Chairman, it has been almost five years since the Supreme Court made it legal to destroy this symbol that unites us all. Here in Washington I have heard

some say that they thought the issue had died. Well the issue is far from dead. The issue has been debated and discussed in all corners of the nation—in the hall's of every state Capitol to the local barber shops. Our nation's greatest legal experts have presented their views, and vast amounts of media attention have been directed toward the issue state by state.

Forty-nine of the 50 states have considered the issue and passed resolutions calling on Congress to pass this amendment and send it back to the state legislatures for ratification. This united call is a monumental, historic event. Never before in our nation's history have the state legislatures been so united in calling for an amendment to be sent to them for ratification.

It is also not an accident that more than 270 members of the House have cosponsored the current amendment. Nor that more than 90 organizations—from the Fraternal Order of Police to the Grange—have joined the American Legion and The American Legion Auxiliary in forming the Citizens Flag Alliance. The CFA now has chairmen in all 50 states and has gathered almost one million petition signatures calling on Congress to pass this amendment. Public support remains firmly in favor of the amendment, the most recent Gallup survey found that more than three out of every four Americans not only oppose flag burning, but support a Constitutional amendment to make it illegal.

But, Mr. Chairman, even with this type of wide and diverse grassroots support, this issue will not resolve itself. The Supreme Court's decision can only be reversed by the Congress sending to the states this amendment which manifests the will of a people who are stirred to action. Desecration of our nation's banner is an evil act. Yet, as a wise man once observed, "The only thing necessary for the triumph of evil is for good men to do nothing." I hope the committee will act in the best interests of all Americans, past, present and future.

Mr. CONYERS. Chairman Canady.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. Would you allow me, as the ranking minority member of this committee, to make a few brief observations?

Mr. CANADY. Certainly.

Mr. CONYERS. And I thank you for your kindness.

Mr. CANADY. I recognize the gentleman.

Mr. CONYERS. I realize I am out of order. Members of the committee and ladies and gentlemen, I strongly oppose the desecration of the American flag. The difficulty in the flag-burning issue clearly lies in the conflict between our strong interest in protecting the flag as a symbol of our freedom and our constitutional imperative to protect freedom of expression itself. That is why we are here. Otherwise, we would have passed this in the 1970's, the 1960's, the 1950's. And that is why the Supreme Court has repeatedly held Federal and State efforts to prohibit flag-burning to be unconstitutional. We are the only Nation in the history of the world which has elevated freedom of speech to such a level.

Now, flag-burning is not a new public policy issue, as we all know here. The Supreme Court has reviewed the issue in one form or another on five separate occasions going back as far as 1931. And long before the *Johnson* and *Eichman* decisions, Congress had considered a variety of approaches to this difficult issue.

My own involvement goes back to 1967 when this subcommittee approved legislation in the wake of a series of flag-burning incidents connected with Vietnam War protests. Because of this history, I fully recognize that the issue goes to the very heart and soul of the Nation and touches some of our citizens' most sensitive nerves; and that is why I am hopeful we can have a complete hearing concerning H.J. Res. 79 and avoid a debate designed to score political points or to comply with some artificial deadline.



This is serious business. Before we vote on yet another proposed amendment to the Constitution, I hope my colleagues on the committee will consider these couple of questions:

First, has the case been made that the problem of flag desecration is so severe that a constitutional amendment is necessary? Studies have indicated that fewer than 45 reported incidents of flag-burning have occurred in all of American history from the adoption of the U.S. flag in 1777 to the *Johnson* decision in 1989. And ironically, past efforts by this body to criminalize flag-burning may have only encouraged greater disrespect for the flag. So we must be careful to make sure that the proposed cure is not worse than the perceived disease.

And second, have we considered whether efforts to protect the symbolic importance of the flag don't serve instead to undermine our most valuable constitutional principles?

It has been said that a nation's commitment to freedom of speech can be measured by the intensity of the dissent that it tolerates, and this is what separates our country from authoritarian regimes which promise freedom of speech but will never protect it when the going gets tough. The question we need to answer is whether we as a Congress and whether you want us as a Congress to go on record for the very first time in the history of this Nation as carving out an exception to the first amendment.

We want to ask ourselves whether the proposal before us will clearly and unambiguously deter flag-burning. Or will it only bring about an incredible legal quagmire which threatens to trivialize this serious issue? And there are some questions that are troubling, but I just want to thank our chairman for his generosity in allowing me to make these observations as ranking minority member, and I ask unanimous consent that my statement be included in its entirety in the record.

Mr. CANADY. Without objection. Thank you, Mr. Conyers.

I would like to begin by asking Professor Presser if you have any response to particular questions that were posed by Mr. Conyers.

Mr. PRESSER. Yes, I do. I wondered if you would mind if I made a quick response to Mr. Bolick, a point that he raised that I think is important.

Mr. CANADY. That will be fine.

Mr. PRESSER. I will begin with Mr. Conyers.

You said, sir, quite eloquently that your concern that this amendment carves out an exception to the first amendment. I don't believe that it does that at all. I believe that what is at stake here is the first amendment freedom and protecting the first amendment freedom.

The Supreme Court in *Texas v. Johnson*, I think, carved out an exception to our traditions going back 100 years. This isn't about the first amendment. This is about self-government. It is about the kind of security that you need in order to have the kinds of freedoms that you prize. This is not a trivial issue.

Now, I also think—and I said this before, but it bears emphasis—I don't think the Republic is threatened by platoons of flag-burners. You are right about that. But I do think that the Republic is threatened by a situation in which it becomes doubtful whether

the people can express the kinds of things that were referred to earlier by the Gold Star widows and by the veterans. This is important stuff to the Republic. It is the very stuff of what makes a Nation great. It is the very basis of civilization that you need in this country.

This is a close question, as you said. It is a close question whether the act of burning a flag is speech or whether instead it is an incendiary outrage that is more like an inarticulate grunt. It seems to me when a question is more difficult, you turn to the people. It is their job to help you understand the Constitution; and I think the people's views are clear on this one.

The final point I wanted to make in response to Mr. Bolick is, he cited, again with great eloquence—and I have an enormous amount of admiration and respect for Clint Bolick, and we agree, I think, on most things but not on this one. He talked about the Boston Tea Party. He talked about Rosa Parks. He talked about Tiananmen Square. He talked about the Alien Sedition Acts. He gave a lot of examples about civil disobedience. But curiously what the Supreme Court did in *Texas v. Johnson* in 1989 is make flag-burning not an act of civil disobedience; it makes it, in fact, a trivial act. Indeed, if I were a flag-burner, I would want to see this amendment pass so that when I did decide to go out and burn the flag it meant something. It was an expression of—a profound expression of views and one that made a powerful statement. It doesn't now.

Mr. CANADY. Thank you.

On that issue about the Boston Tea Party, I found the reference to that interesting. As I understand, you believe that the Boston Tea Party involved symbolic speech. Do you think in the First Amendment—as I understand, if my history is correct here, I understand the Boston Tea Party involved the looting and destroying of property. Would you believe, Mr. Bolick, that the first amendment would protect acts such as those that were involved in the Boston Tea Party which you label as symbolic speech?

Mr. BOLICK. No. And first I would like to return the compliment. I admire Professor Presser enormously, as well, but he is entitled to be wrong every once in a while.

No. And in fact, if a flag-burner were to burn a flag that belonged to you or I, that would be clearly a criminal offense. If there was an act of trespass involved, that, too, would be the sort of thing that could easily be punished without offending the first amendment. But burning one's own flag as an expression of a political statement is absolutely protected.

There is one point I would like to respond to Professor Presser on, and that is responding to the will of the people. I think that the Republicans on this committee and perhaps many of the Democrats, as well, would agree with me that the Constitution is not a granting of rights. It is a recognition of rights that we have as individuals. And the right of freedom of speech is an inalienable right that is recognized by the first amendment. That is why I believe this amendment, while this body has the power to enact it, it does not have the right to enact it.

Mr. CANADY. Let me ask you about this.

Some people have argued that any restriction on absolutely free speech is inconsistent with the Constitution and natural law. Under this absolutist view of the first amendment, isn't it true that no restrictions on speech, even those related to obscenity, libel or fighting words would stand? Isn't that position entirely inconsistent with the current law and entirely inconsistent with our traditions?

Mr. BOLICK. I think, Mr. Chairman, that the question in all of those cases is what is regulated speech. Now I might draw a line in one place or another.

Mr. CANADY. My time has expired. Without objection, I will take additional 2 minutes.

Mr. BOLICK. But the point here is that I don't think that there really is any dispute as to whether this is an act of communication. I don't think any of us would be here.

Everyone talks about how offended they are. Why are they offended? Because it is an act of desecration of a national symbol which conveys very powerful speech and communication. And it is for that reason that I think that this is not really a close question. It is the ultimate act and, in my opinion, the most offensive act of speech that could happen against our Government or our Nation, and it is precisely because it is speech that we have to protect it.

Mr. CANADY. Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. Before we start, could I put into the record a statement from someone who could not be here today? It is from Charles Fried. I particularly want to do this because I feel sorry for Justice Scalia that——

Mr. CANADY. Without objection.

Mr. FRANK. Thank you.

I mean, Justice Scalia, a Reagan appointee, is being criticized so severely for this radical departure with American tradition since Justice Scalia wrote that opinion; and I just hate to see Justice Scalia all by himself getting attacked from his conservative friends. So I thought we would put another Reagan-Bush appointee into this, Charles Fried, who was Solicitor General.

Mr. CANADY. I believe Justice Brennan wrote the opinion.

Mr. FRANK. Justice Brennan.

Mr. PRESSER. Scalia did concur.

Mr. CANADY. He concurred, but didn't write it.

Mr. FRANK. Scalia was one of the votes. I remember Justice Scalia remembering his wife was whistling "A Grand Old Flag" when his wife came down to breakfast.

Justice Scalia in the majority—I accept that correction—he is only a partial culprit. But I did want to add former Reagan and Bush appointee Charles Fried, Solicitor General, who in January—in June 1990, he also made a strong statement against the constitutional amendment. I would ask that that be in the record.

Mr. Presser, you said if you were a flag-burner you wouldn't want the amendment passed.

Mr. PRESSER. If I were a flag-burner, I would want it passed.

Mr. FRANK. You would want it passed?

Mr. PRESSER. Yes.

Mr. FRANK. Because if we passed it, it would make flag-burning a more powerful statement.

Mr. PRESSER. Yes.

Mr. FRANK. Why would I want to make flag-burning a more powerful statement, Mr. Presser?

Mr. PRESSER. Because you ought to be interested in the values that I suggested a little bit earlier.

Mr. FRANK. You are suggesting that now flag-burning is, in fact, trivial and it is outrageous and stupid and juvenile, and that by passing the constitutional amendment, we will be heightening the power of that statement. I think that there is a lot of truth in that, and that is one of the reasons I don't want to pass this amendment.

I don't want to give these people the satisfaction of thinking that they were able to, extraordinarily, get the American Constitution amended. I do not want them to think I take them seriously enough or feel remotely threatened by them.

I would like to agree with you and say, yeah, I am going to say to the flag-burners, no, you don't scare me, you don't impress me, you have no impact on me. I think you are silly, as well as obnoxious, and I am going to ignore you. I think you are right when you suggest that passing this constitutional amendment will give some of these people boasting rights about it and will enhance the next flag-burning.

Mr. PRESSER. Can I say a word about that?

I don't know whether you remember, Congressman Frank, but we knew each other 27 years ago.

Mr. FRANK. Let's—it is nice we are all nice and friendly, but we are all in a limited time period. We can admire each other afterwards.

Mr. PRESSER. All I was going to say is you were eloquent then, you are eloquent now. The point to be made is there are more important things here than enhancing flag-burners; and that is what I need to stress, that the right of self-government is very important.

Mr. FRANK. Please don't repeat what you said.

Mr. PRESSER. I won't.

Mr. FRANK. I did want to focus on that point about enhancing them.

Mr. PRESSER. There is a way for you to do what you do and that is to pass the amendment and then pass no congressional statute. It says, then you have the power to do this, but you don't do it.

Mr. FRANK. Your view is we should pass this, but not take advantage of it. Well, I don't want to amend the Constitution that lightly and just take up the space.

Let me ask a couple other questions that I have and that is, there is the legal maxim that if you include one thing explicitly you exclude everything else. My problem is this. There are a lot of very important symbols, there are a lot of very important values that we have, and if we single out the flag, we are then saying—and this is part of the problem, because we are dealing with people who have the capacity to be extremely obnoxious in creative ways. So then they will burn Bibles. Then they will burn the Declaration of Independence. Then they will burn other things.

And my problem is that I want to be able to say that my respect for these symbols, my belief in the values they convey is beyond destruction from that crazy, nasty fringe element.

But once I say, oh, they can't do this, I am then creating two orders and I am giving a lesser order of protection to everything else. But let me ask some other questions now because we keep talking about flag-burning but the amendment does not say flag-burning. It says flag desecration.

Under the amendment, Professor Presser, would it be illegal to write on the flag "the Bureau of Alcohol, Tobacco and Firearms consists of jack-booted thugs"? Could you write that on there? I mean, could a militia person say, "This flag is unfortunately being misused by jackbooted thugs"? Could you have a picture of a jackbooted thug which I might say I don't know what a jackboot looks like. Everybody talks about them, and I may be the only one. What about that?

Could that be—could a State make it illegal to write rude and angry things on the flag under this amendment?

Mr. PRESSER. It is up to the individual States.

Mr. FRANK. So the answer is yes?

Mr. PRESSER. How they want to define "desecration."

Mr. FRANK. The answer is yes?

Mr. PRESSER. I don't know.

Mr. FRANK. Now please, Professor Presser, you are not being straightforward.

Mr. PRESSER. No, no, I am being straightforward.

Mr. FRANK. You are supporting the amendment. The amendment says a State may outlaw desecration and it is up to the State. Therefore, if a State said you cannot write on the flag—because flag-burning is a pretty articulate level of expression although it is a pretty inarticulate one and it is probably what those fools are capable of; but you could have more symbolic and articulate forms of expression that were desecrations, and this amendment would allow those to be outlawed, right?

Mr. PRESSER. It is up to the States what they want to do with them.

Mr. FRANK. The answer is, yes, if the State wants to do it.

Mr. PRESSER. Well, the only—

Mr. FRANK. Mr. Presser, is the word "yes" such a hard word to say? Will it hurt your tongue? I mean, if the answer is yes, why not say yes?

Mr. PRESSER. Because the States can do this, but I am not certain there are not still some first amendment issues that might come into play in individual States under the power granted to them under this amendment.

Mr. FRANK. Well, but that is why it seems to me we can't pass the constitutional amendment.

I would ask for the same indulgence, Mr. Chairman.

Mr. CANADY. Without objection, the gentleman has an additional 2 minutes.

Mr. FRANK. Thank you.

That is again part of our problem. You get something you really dislike, you really hate, done by people you hate, who are trying to provoke you; and it is not always easy to get at it in every case. Mr. Bolick clearly pointed out if it was not their flag—by the way, if they were burning a flag in my home State of Massachusetts, we



could get them because you can't burn leaves in Massachusetts. We have an open burning law, you can't burn anything.

I am for prosecuting those people to the extent that you can for trespassing, for disturbing the peace, for vandalism, for malicious destruction of property, whatever, because I don't want to see this happen. But when you get into it, you can't just say, well, I don't know, it would be up to the States.

You are here, you are a professor of law supporting the constitutional amendment. Doesn't giving the State the right to prevent desecration clearly give them the right to prevent you from writing rude things on the flag?

Mr. PRESSER. All I can say with confidence is, it might.

Mr. FRANK. Secondly, we are talking here—and it is probably a physical question. It says the physical desecration of the flag. If you start out with something that is a flag and desecrate it, clearly this would cover you.

But what if you start out with something that isn't a flag and make it almost a flag? Would that be desecration? Suppose you had a flag with the Stars and the Stripes and some of the stars, but then some outrageous thing in the middle. Would that be flag desecration under this amendment?

Mr. PRESSER. I don't think so.

Mr. FRANK. So if you don't start out with the flag, you can get almost to a flag and that is OK.

It is important. A cartoonist then who showed an American flag that was recognized as the American flag but changed somewhat, that would not be a problem?

Mr. PRESSER. From—as I understand this amendment effort, it is narrowly focused on what the Supreme Court did in *Texas v. Johnson*.

Mr. FRANK. It is not a question as you understand it. You have it before you. You are a professor testifying about it. This is not some casual thing.

The reason I say this is this. It shows why many of us have difficulty in translating the severe dislike we feel.

Mr. CANADY. The gentleman's time has expired. Do you want one additional minute?

Mr. FRANK. No, that will be it.

Mr. PRESSER. Could I have two seconds to respond to that?

Mr. CANADY. Without objection, the gentleman will have an additional minute.

Mr. PRESSER. Congressman Frank, what you are saying is the kind of an objection that is raised every time a constitutional amendment comes along. The ERA was questioned because it was going to produce unisex bathrooms. The amendment is just an enabling—

Mr. FRANK. You were for the ERA, Mr. Presser?

Mr. PRESSER. I never took a position on it.

Mr. FRANK. That is sort of an odd—you never took a position on the ERA? Well, then I am not surprised you can't tell me about desecration on this one.

But, yes, I realize that is the kind of question that is raised every time there is an amendment. That is one of the reasons why we don't have many amendments. That is one of the reasons why, par-

ticularly in the area of free speech, we made—some of us think if we are going to err, we should err on the side of letting these obnoxious and unimpressive people be irrelevant rather than risk all these kinds of questions that could get into this.

And I would even say to people—you know, we have got a lot of complaints now about the militias, about other people. These are not idle questions. I think that if you say every State can regulate what goes on with the desecration of the flag, it affects the physical transformation of the flag because desecration is in the eye of the beholder, you are going to get into some difficult questions and that is our problem.

Thank you, Mr. Chairman.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman. This is indeed a weighty problem, but I think one that comes to the core of the first amendment and the core of our right to protect ourselves from sedition, once that was codified as illegal activity.

Let me ask this. There are certain first amendment prohibitions that exist now—the famous “fire” in a theater, fighting words and things that are obscene.

Let me ask you if you were to have, as opposed to a State-by-State standard, a national standard for desecration codified by constitutional amendment, how would that change or amplify your view of these?

Maybe we can begin from left to right.

Mr. DETWEILER. Well, I don't think our view would change. I think the amendment merely fills the void that the Supreme Court says needs to be filled. And the people—through the process, 80 percent of the people have asked this Congress, through their resolutions, and, we are now asking through the proposal of this amendment to give the people the opportunity to ratify the amendment.

Congress probably would consider—the amendment gives Congress the right to consider legislation. And I am sure, in spite of what has been discussed previously, that the Supreme Court is not going to take a back seat on this. No matter what legislation is eventually passed, if the amendment passes, the U.S. Supreme Court is going to exercise its authority.

Mr. FLANAGAN. Mrs. Lee.

Mrs. LEE. I would just like to say that Gold Star Wives unanimously passed a resolution to support a constitutional amendment to ban flag desecration. Other than that, I would like to defer to our legal scholars.

Mr. FLANAGAN. OK. Gentlemen.

Mr. BOLICK. Mr. Flanagan, the Supreme Court has carved out very narrow exceptions to the first amendment, as you point out. For example, screaming “fire” in a crowded theater is an act of—that is perceived to create danger. There is one area in which I cannot think of any exceptions that the—that the Supreme Court has carved out, and that is an expression of political statement on the basis of the content of that expression. And that is what we are doing here today.

I disagree with Professor Presser that the Supreme Court is going to come down and protect us against the kinds of things that

Mr. Frank was talking about before. I think that when you speak very broadly in terms of flag desecration and if you are talking about the will of the people in this regard, you are opening up a Pandora's box.

The totalitarian governments forbid flag desecration precisely because they are terrified, because they are afraid of the man standing in front of the tank in Tiananmen Square. We allow it because we are not afraid of the pathetic idiot who burns the flag, and that is—I hate to see fear motivating the amendment of our Constitution.

Mr. PRESSER. Just a couple of quick responses.

The first one is one I share with the first two who spoke. This wouldn't make any changes in the kind of things that you talked about. I should say, though, that it is important to bear in mind that this is not a question of content discrimination.

It is a powerful political statement when you shoot a President or when you assassinate a Member of Congress. Punishing that might be regarded as content discrimination, but it is not. You are punishing a harmful act. You can draw distinctions between flag-burning and protected speech.

Mr. FLANAGAN. Let me ask this question, and maybe to take it out of a first amendment argument and put it into an article V argument. That is, do the people of the Nation have the power to amend the Constitution in such a way that in your scholarly opinion, or maybe in conformity with scholarly opinion—for or against, depending upon the position in which you have struck out—can the people amend the Constitution in such a way as to be inviolative or amplify the first amendment?

Mr. PRESSER. Sure.

Mr. BOLICK. Yes. I think on this point there is agreement that the people do have the power to do it. If they do it they will have violated the principles of inalienable rights on which our Constitution is based. That is my argument.

Mr. FLANAGAN. So you root objection to the amendment deeper than the first amendment, but to the natural law?

Mr. BOLICK. On which I believe the Constitution is predicated.

Mr. FLANAGAN. OK.

Mr. DETWEILER. I think the Constitution is clear in article V that we, as a people, have the right when we have a grievance to go through the democratic process to seek a correction to that grievance.

I think the people, through the polls that have been taken, through the evidence that has been shown here this morning, have a desire to see a change. They disagree with what the Supreme Court said in the narrow decision, 5-to-4. And they are participating in that process and they are petitioning this Congress to regress those grievances. And that is what they are asking, an opportunity to change a decision that 80 percent of the American people say, in their opinion, was wrong.

And I think that is all part of our process. It is not a trivial situation.

You don't see amendments pass very often. There have been hundreds of amendments proposed, many in this particular Congress. This is the first one that I know that has such support.

Mr. FLANAGAN. Mr. Chairman, with your indulgence, 30 seconds.

Mr. CANADY. The gentleman's time has expired. Without objection, he will have an additional minute.

Mr. FLANAGAN. I just wish to note—and your thoughtfulness on this is appreciated—but, Mr. Bolick, in direct response to the natural law argument, which is very powerful and has a great deal of quality in itself, I will tell you, though, that we are a Nation of laws. We have codified them. We have put them down on paper. We have done our best to embody them already in that grand document, the Constitution, which is our road map; and it is the Supreme Court, charged with the duty of having the final level of interpretation of that document.

But still we are a Nation of laws, and I would tell you that—I would believe that if the amendment process is not violative in some way of some other article, then the Constitution may be amended. Natural law argument notwithstanding, I remain skeptical of saying, well, we can't even do article V, that is amend the Constitution, because natural law says no.

Mr. BOLICK. No, no, I think that you—and this is the distinction. You have the power to do it, but we will have sacrificed something very, very important, and that is the concept that there are inalienable rights that no majority, no matter how large, can abridge; and once we have done that, I think that we have done something pretty bad to our society.

Mr. FLANAGAN. I appreciate that. I thank the panel. I thank the Chair.

Mr. CANADY. Mr. Serrano.

Mr. SERRANO. Thank you, Mr. Chairman. Mr. Chairman, let me preface my comments by saying that I am one of those individuals, if I am walking down the street and I see someone burning our flag, I am going to grab him by the head and smack him not because I disagree with his right to do so, but because he is stupid and should be dealt with in that way. And when I wore the uniform of our country during the Vietnam War, I was proud of what we stood for and what the flag stood for and stands for today.

My concern is that what we are talking about here is leaving it to the States to decide not only what is desecrating the flag, but in some cases telling us what the flag is. So since we do live in a very visual society in terms of television and everything, I wondered out loud, is this a flag—is this a flag?

We knew what the people with the World Cup were trying to do when they put this T-shirt together. They were pushing U.S.A. with the flag. On the sleeve, it definitely has what we all know to be a flag. The stars—instead of stars, it has a soccer ball and the markings of a soccer ball.

Is the treatment of this shirt in an improper, sweaty way desecrating the flag? I wonder.

Secondly, I was born in Mayaguez, PR, and over there they are very proud of the municipal symbol. It says Government of the Municipality of Mayaguez, and it has the flag of Puerto Rico and the American flag. If this is hurt in any way, is that desecration of the flag?

Now, we also find the flag in many different forms that upset people. This morning, one of the New York radio stations that

plays here was telling us that Herman's is selling Speedo swimwear for women where the stars are shown in a certain part of the woman's body and the stripes on another. Now, some people may consider that insulting, but—not insulting, but there is still an issue here.

The flag can be found on jogging suits, on T-shirts, on bandanas, patches to cover holes in jeans, pants and shorts, skirts, jackets, beach towels, shopping bags and tattoos, paper plates and paper cups—someone may drink alcohol from that paper cup and another person may find that totally improper and insulting.

Downstairs, staffers found these three items for under \$10. I have to repay them. This is a sort of a plaque pin. Here is the flag patch which we can all wear proudly. Here is a flag pen; is this the flag? Is biting on this during a nervous debate, as I do often, desecrating the flag? Is wearing this patch on my shorts while I run in the New York City Marathon—I have run the marathon but without this kind of a flag—desecrating the flag? Is it my choice of what desecration is or is it your choice?

David Duke running for President with the American flag in the background insults me. Is that desecration of the flag? I wonder.

Now, is it this flag which can be purchased at KMart for \$1.99 and was made in Taiwan? Perhaps that is the biggest insult to the flag; it is not made here any longer.

This flag was placed on a staff member's lawn with a sign that said, "We can sell your house; call us." Now, that is capitalism at its best, but is that the way you want your flag to be treated?

I could listen to the possibility that the flag that flies over this Capitol is the official protected flag of the Nation, and anyone who climbs up to burn that flag is in deep trouble. Or take one flag at every State capital and one national flag and say, "Those are the official flags." I am not sure I am for that, but I could listen to that. But every flag in the country, every piece of cloth, every T-shirt? I don't think so.

During the floor debate on June 21, 1990, I made this statement, and I am amazed how well it still reads. It says, ". . . in preparing for this debate today, I wondered what the flag would say to us if it had an opportunity to speak to us right now. It would probably say, I submit to you, 'Listen, don't worry about me. I am on more lawns, more schools, more churches, and more classrooms . . . than I have ever been before. I was there in Tiananmen Square with Lady Liberty and Jefferson and the quotes from Lincoln. What I want you to do is to take care of what I stand for. Take care of the homeless. I don't want my children to be homeless. Take care of the hungry. I don't want my people to go hungry. Take care of those who are in need in this society. And while you are at it, I am sure the flag will say to us, 'help my children get along with each other. Let us put aside racial, ethnic and religious differences and help us come together.'" This is what the flag—

Mr. CANADY. The gentleman's time has expired. The gentleman will have 2 additional minutes?

Mr. SERRANO. Thank you.

This is what the flag means to me, and I am concerned that in desiring to do what is right, we will create a problem that we can't



control. And if we do that, if we say that you can't burn or desecrate a flag, then I think we should tell corporate America that they can't use it to make money because that, some people may consider insulting.

So let us take a long look at what it is that we are trying to do. Let us honor the flag by being good to it and good for it. And while we understand the sentiment behind the flag for some people, we have to be careful when it comes to defining what we are talking about.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Serrano.

Mr. Hyde.

Mr. HYDE. I thank the Chairman.

I want to say to my good friend from New York, Mr. Serrano, I appreciate very much the statements he made in his prayer to the—for the flag to us about taking care of the homeless and the needy. It was certainly moving and appropriate. I always, when I hear that sort of sentiment expressed, listen carefully to see if someone is praying to give my children a sense of responsibility. I never hear that. I hear, take care of the homeless and the needy and the poor, which we have to do and ought to do, but I think one of the things we ought to pray for is a sense of personal responsibility. That would cure a lot, I think, in our country.

Mr. Bolick, I think your testimony is—is very important, and I think you express a point of view that is very legitimate and troubling to me. On the other hand, I am—I look at the first amendment, and I say there are reasonable regulations. We have not only laws against obscenity, but copyright, so there is a property interest in something that may not be exploited. We have classified information that may not be disseminated. That is a restriction on free speech.

You take a \$20 bill and set fire to it; you have committed a crime. Why? Is there some value in that \$20 bill?

What about the value in the flag? Not for the cloth, but for what it stands for, a spiritual value. I am not troubled by making that a crime. I am troubled by the desacralization—that probably isn't a word, I don't know.

I am troubled by nothing deserving of respect in this country. We have lost respect for each other. That is why we shoot someone for a pair of gym shoes or a basketball. That is why we have a million-and-a-half abortions and still climbing. Listen, me over thee. There are apt to be a few things that bring us down to Earth and say, respect for this, respect for each other as fellow human beings.

And that flag clutched to the bosom of Rose Lee is very special. It is not cloth. And it says there are things worth living for and worth dying for and you live in a civilized society. You think you are civilized. You ought to lift those things up. Some things ought to be beyond the pale.

And I just think if a \$20 bill is so damn special that you can't set fire to it, whatever property value or symbolic value or whatever the reason is, it seems to me that flag has a lot more value than \$20 and what is invested in it. So it is not an easy question, not an easy question.

Freedom of speech is very precious, but some things just ought not to be—nobody ought to insult somebody's mother or heritage. It is a sign of a lack of civilization, and it is moving us to real chaos in this country. So let's have a few things that we can respect. And the flag certainly binds us together with its aspirations of freedom and liberty, opportunity, no matter who you are, what you are; and so that is where I come down.

But it is a fascinating discussion and not an easy one, as you know.

Mr. BOLICK. Mr. Hyde, I agree with much of what you have just said and I don't understand why it is illegal to burn a \$20 bill. But just a couple of responses.

I agree that there are certain things that are sacred and that I certainly hold sacred. It is—it is a testimony, though, to how bad things are if you need a law, however, to make something sacred. I think that the flag should be sacred and off limits, not because it is unlawful for it to be desecrated.

Mr. HYDE. Mr. Bolick, life is sacred; and we sure need laws to protect life, and they are not that well enforced. So the need of the law, it seems to me, is a statement on our deficiency, our shortcomings, not the essential question involved, if I may interrupt.

Mr. BOLICK. Well—and I agree with that. But here we enter into a realm that is, I really think, pure expression. I believe it was Mr. Frank who was bringing up the burning of the Bibles and things of that nature.

The Supreme Court a couple of years ago ruled that it was protected speech to burn a cross, an equally sacred symbol to many, many people. And the reason it is protected is because we all know what it means when somebody burns a cross. And it is—and I find that a vile, horrible act. But it is protected because it is expression and that is what, unfortunately, an act of flag desecration is.

If I lived in an unfree society—

Mr. HYDE. Is an obscenity an expression?

Mr. BOLICK. Well, I think there is a much more arguable case to be made that it is not expression than a flag desecration. Again, the reason—if I were in an unfree country where I could not express myself, and I went out and burned the flag, I don't think anyone would have any confusion about what I was doing. I was saying something against that country, and we would applaud that in many such places.

Here, I think that we are—we are unquestionably talking about suppressing expression because we find it offensive, and that is precisely what we have to protect if we are to remain a free society.

Mr. HYDE. We have got to—it is my last sentence. We have got to find some things offensive in this culture. I don't think we find enough offensive, frankly.

Thank you.

Mr. CANADY. Thank you, Mr. Hyde.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. You know, I respect and love my chairman of this committee, Henry Hyde, but when he tells you kids kill for a pair of tennis shoes and they don't have any respect, that has nothing to do with freedom of speech. That is crime, and it deserves a lot of attention that we don't give it.

And when we say—when I hear him say we have lost respect for each other, well, what about the death penalty? We have imposed more dozens of death penalties in this room than any Congress in American history and more coming. Prisons, build 'em. Universities and colleges, forget it. Eliminate the whole Department of Education.

And so I get a little tired of hearing people talk about we have lost respect and how do we get it back. When the KKK, the Klan, marches, the ACLU defends them and people go off the roof. The Aryan Nation has a right to do whatever they want, and we have got G. Gordon Liddy telling you where to plug a Federal agent; and you say, good night, what kind of respect do we have? And why do we let that go on? We need more respect.

And so, let's punish those flag-burners. Let's make them famous. The last time a flag was burned in the United States of America was after the *Texas v. Johnson* case where a guy decided to test it. It is the last time that I know about.

And so what I want to ask you, Mr. Bolick, because like Fried and Scalia—I disagree with them on many subjects, but this is one that kind of brings us together, to understand getting angry all the time isn't going to lead you to the best solution, and taking a poll of what the American people want can get you in big trouble.

We have been trying to desegregate the United States of America constitutionally since the 1950's, and if we had taken votes about *Brown v. the Board of Education*, or what to do with Rosa Parks for violating that law, I hate to tell you what the polls would have shown. And that is what the Constitution is for.

And I would like to invite your comments about what we have been talking about this morning once again.

Mr. BOLICK. Mr. Conyers, I think that you are absolutely right. I think that the Framers of our Constitution weighed this very question, and instead of saying, Congress shall make no laws except, they ended with the expression "no laws" because what is offensive to one generation is not offensive to the next. What is offensive to a majority is an important opportunity for the minority to express itself. And so the Framers decided to make one area completely off limits to majoritarian impulses, and that is why—the ACLU and the Institute for Justice do not see eye to eye on a heck of a lot of things, but the one thing that we do see eye-to-eye on, I hope and I think, is that free political expression is inviolable, it is an inalienable right.

Mr. CONYERS. Mr. Presser, I am going to give you one more chance because I noticed that there was a certain relationship between us in terms of things that we do agree on. The first thing we agree on, this is a close question.

Mr. PRESSER. Yes.

Mr. CONYERS. The second thing we agree on, it is not a simple question; it is a very important and complex question. And shortly I am going to ask that we make sure that we have thought about some of these important questions we have raised, carefully.

A lot—I commend Mr. Canady on this hearing, bringing these witnesses. But the fact of the matter is that until we all read this transcript and check out our responses and maybe do some research and put our staffs together, we have just had a—probably

a very interesting hearing. And if you like Presser, great. If you don't like Bolick, OK. And then we just end up choosing, rechoosing sides from an opinion we already have.

What I would like to do is approach this as reasonably and carefully as we can. I seriously object to the burning of flags. I don't think that we are going to get at this by reaching in the holster for the trigger for another constitutional amendment as rapidly as we are moving.

Could you agree with that, Professor Presser?

Mr. PRESSER. Everything but the last part, Congressman. You and I agree, Mr. Bolick does, and I think everybody in the room agrees that political speech needs to be protected, that ideas that are unpopular need to be protected, that the measure of the quality of democracy in this country is whether we listen to ideas that we don't like.

But I think—I guess you and I disagree along some of the lines that Chairman Hyde was speaking about. I think there comes a point where you need to protect the responsibility that citizens have in this country. Indeed, I would go so far as to say it is a principle of natural law that you can't have pure liberty without it degenerating into anarchy. You need responsibility, and I think this amendment helps further that effort.

Mr. CANADY. The gentleman's time has expired.

Did the gentleman want more time?

Mr. CONYERS. Just briefly.

Mr. CANADY. The gentleman will have an additional minute without objection.

Mr. CONYERS. Why don't we leave it with the courts to decide? Why do we—one, two, three, four Members of Congress, who in God's name are we to decide a question that has been battling around like this that we are going to decide it this morning, May 24, let's take care of this now.

Yes, another constitutional amendment, what is wrong with that? That is all we have had, you know, about every other week, somebody says, you know, by the way, I have had it with this group or this person or this conduct or this organization. Let's pass a constitutional amendment.

Mr. HYDE. Will the gentleman yield?

Mr. CONYERS. We came to Congress with that. I will be delighted to yield to the chairman.

Mr. HYDE. The problem is the Supreme Court amends the Constitution all the time. We just want to get in there once in a while.

Mr. CONYERS. That happens to be their job. I am sorry, they don't make sausages over there, Chairman Hyde. They review the Constitution. Marshall said that in the first big case they ever had before them that we interpret the Constitution. That is their job.

Mr. PRESSER. May I? They are supposed to tell us what the Constitution means but, when they get it wrong, it is the people's job to correct them. And this isn't about you or me, it is about the people.

Mr. CONYERS. You know, the way we can do that, it is very simplistic to say that let's check with the people. But you and I know better than that, really.

Mr. CANADY. The gentleman's time has expired.

Mr. CONYERS. I don't need anymore time. But let's not tell every time we don't like a Supreme Court decision to check with the people and see what the polls say. That is not American democracy.

Mr. CANADY. I want to thank all the members of our second panel for being with us today. Appreciate your testimony.

Will the members of the second panel please take their seat. I am sorry, the third panel.

There are three members on our third panel. First, we will hear from Adrian Cronauer. He is currently vice president of the Vietnam Veterans Institution and a senior associate with Maloney & Burch. He is perhaps best known as the character portrayed by Robin Williams in the film "Good Morning Vietnam."

Bruce Fein is a well-known commentator on law and public policy. His writings on constitutional issues appear frequently in the press.

Robert Nagel is the Ira Rothgerber Professor of Constitutional Law at the University of Colorado Law School. He is the author of two books on constitutional law.

We appreciate your taking the time to be with us today. Without objection, your full statements will be made a part of the hearing record. I would ask that you limit your oral statement to five minutes.

The first witness will be Mr. Cronauer. Thank you for being here.

**STATEMENT OF ADRIAN CRONAUER, SENIOR ASSOCIATE,  
MALONEY & BURCH**

Mr. CRONAUER. Thank you, Mr. Chairman. And good morning, Mr. Chairman.

The movie "Good Morning Vietnam" has led to some interesting experiences for me. One of the problems is that people recognize my name much more readily than my face and, for example, just outside this committee room this morning earlier, I passed a group of people and heard someone say, that is the guy they made that movie about. And the other person said no, that can't be him. That fellow doesn't look a bit like Robin Williams. At that point, another person said well, of course not, that is Judge Bork.

But "Good Morning Vietnam" did make some interesting changes in my life. It led me to pursue a second career after a lifetime in radio and television and advertising. I decided about 10 years ago it was time to get into an honest profession so I went to law school. And the movie allowed me to pay for my legal education. So I am very happy about the movie, but it did contain a substantial amount of Hollywood exaggeration.

Anybody who has been in the military will tell you, if I did half the things that were done in that movie by Robin Williams, they would have court-martialed me and I would probably be speaking to you today from Leavenworth. One of the things that is true in that film is I did indeed fight censorship and I have had a very long interest in the first amendment. Many years ago in the early 1970's when Spiro Agnew was engaging in media bashing with his famous phrase about the "nattering nabobs of negativism," I was running a television in Virginia, a little UHF station and I started going around to business and community groups making speeches about freedom of the press and freedom of speech, and that led me



to a general interest in the first amendment, and that may eventually have been one of the reasons I did decide to go into law. And my interest in the first amendment has continued even more so after law school because I practice communications law.

And early on, 5 or 6 years ago when I first became interested in this particular question of the flag amendment, I was against the idea of amending the Constitution because I believe so firmly in the first amendment.

But after the past 5 or 6 years of traveling around, "Good Morning Vietnam" has given me the opportunity to travel to schools and veterans groups and various other kinds of organizations to speak in public and talk with people throughout the country, and in each case, I have found that people around the country feel very, very strongly about the flag. They feel very upset at the very idea that someone would wipe their feet on or burn or otherwise desecrate the American flag.

And by talking to these people, I have come to the conclusion that there is a qualitative difference between the flag and any other symbol. There is an intellectual and emotional uniqueness about the flag because it stands for patriotism, love of country, freedom, democracy, the country itself, and the sacrifices that people have made for that country.

I think the first amendment in a way has—has a quality, if you can use the phrase, secular sacredness about it. But it has come to my attention from talking to people across this country that justice is secularly sacred, perhaps even more so, is the symbology of the flag. And people feel so strongly about it, 49 States have already passed resolutions on this subject.

Polls are quoted as saying 80 percent of the people, approximately, are in favor of this amendment. My experience is that 10 out of 10 people I talk to are in favor of it. So I don't think we would be setting any sort of dangerous precedent. We would just be bringing the Constitution into line with the will of the people. And the Constitution can be amended.

The Founding Fathers recognized that. The possibility of being able to amend the Constitution is vital to our system. Sure, it is hard to do but that is proper. Because it only should be about important issues. And the vast majority of the American people say that this issue is important. Ultimately, it is the people who have the final right to determine what is important.

We talked a bit about natural rights this morning. And I would submit to you that an even more fundamental natural right, if you will, is that the power to govern derives from the consent of the governed. And the people of this country, it is my perception, do, Mr. Chairman, think that this is important enough an issue to amend the Constitution.

I can't understand how any elite from inside the beltway, from academia or from anywhere else can really believe they are entitled to deny the American people this fundamental right. So I would urge you and the other members of your committee to send this amendment on with your unanimous support.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Cronauer.

[The prepared statement of Mr. Cronauer follows:]

PREPARED STATEMENT OF ADRIAN CRONAUER, SENIOR ASSOCIATE, MALONEY & BURCH

Mr. Chairman and members of the subcommittee. Thank you for allowing me to speak today in support of H.J. Res. 79, which would provide for an amendment to protect our flag from acts of physical desecration.

My name is Adrian Cronauer and I'm an attorney here in Washington. But thirty years ago, I had a much different job in a far different place. As a young Air Force sergeant in Saigon, it was my duty and privilege to greet our troops every morning with this radio wake-up call: "Good morning, Vietnam!" Hollywood made a movie by that name based ever so loosely on my year as a military disc jockey in Vietnam. I must admit I'm nowhere near as funny as Robin Williams, who played me in the picture. But I was a lot better disc jockey. And if I'd done half the things the movie said I did, I'd be speaking with you today from Leavenworth. So there was plenty of Hollywood exaggeration and outright imagination in that movie.

But there was also an important element of truth. It was my job—"our mission" as the Air Force would say—to boost the morale of all those young men plucked from their hometowns and deposited half way around the world in Vietnam. That's a tall order. But I discovered a method that worked best for me: Within the confines of the military and the confines of a war, you push the First Amendment as far as you can. You say and do outrageous things that push right up to that invisible line the military creates between what's acceptable and what's not.

If you go over the line you're in deep, deep trouble. But if you push right up to the line you can accomplish important and wonderful things. And live to fight another day.

After Vietnam I enjoyed a career in broadcast journalism, as an announcer, a local news anchorman and a station manager. I was running a television station in Roanoke, Virginia when Spiro Agnew launched his "nattering nabobs of negativism" broadside against the press. As a self-styled defender of the First Amendment, I took it upon myself to visit every business and luncheon club that would have me and speak about the importance of the First Amendment in our society. The process of gathering and disseminating views and information is truly a crucial foundation of our democracy.

The reason I'm providing this bit of background is this: In a debate about protecting the flag that is argued primarily on First Amendment grounds, I bring a rather broad perspective to the table. I've been concerned with protecting, even expanding, our First Amendment rights my entire life. And frankly, when the flag protection issue first arose, I was reluctant to do anything that might be seen as tampering with the Bill of Rights. You just don't fool around with the Constitution.

I still feel that way. Yet I sit here today in support of amending the Constitution to prohibit the physical desecration of the flag. I do not take this position lightly. Reaching this decision really involves another journey, one that began after "Good Morning, Vietnam" was released six years ago.

The movie led to a number of generous invitations to travel around the country and speak to veterans groups. The invitations continue to arrive to this day, and I continue to enjoy the privilege of speaking with the men and women who risked their lives in defense of the American flag. And from these meetings I've come to realize just how strongly people—vets and non-vets—feel about protecting the flag. The veterans talk passionately and eloquently about how people should not be allowed to wipe their feet on the flag, burn it or desecrate it in any way.

Through many hours spent with these people, I've come to feel that the flag is qualitatively different than any other symbol we have in this country. It represents things that are both intellectually and emotionally unique—patriotism, love of country, country itself, and the sacrifices that have been made on behalf of this country generation after generation. Because of the flag's uniqueness—what I call its secular sacredness—I think it can be given special status without setting a dangerous precedent that waters down the First Amendment. Not only can it be granted that status, but it should.

Again, this is not a position I reached easily. It's one I've thought about and re-evaluated many times over the past five or six years.

It would serve us well to consider for a minute the Constitution itself. No one went up to a mountaintop to retrieve it. It's not a series of tablets carved in granite. Rather, our Constitution is a brilliant attempt by the Founding Fathers to set forth the basic principles that would guide our nation. In their wisdom, the Founding Fathers realized there was no way they could possibly imagine all the issues that would confront us in the future. Freedom of the press, for example, had a much different meaning in the printing press days of Benjamin Franklin than in the 500-channel cable days we live in today.

But they produced a document that was flexible enough in most cases to deal with changing circumstances. And they also fashioned a means by which the document could be changed if it grew too out of touch with the feelings, desires and perceptions of the vast majority of Americans. That is the amendment process we are engaged in here today.

The Founding Fathers deliberately made that process difficult and cumbersome. They wanted to ensure that only issues that are extremely vital and important would merit consideration when it comes to changing our basic governing charter. And it is now my view that protecting the American flag meets that difficult standard.

Significantly, the Founding Fathers left the final decision for amending the Constitution with the states, returning the ultimate responsibility back to the people. The people deserve the right to decide if their flag merits constitutional protection. The fact that 49 state legislatures have already passed flag protection resolutions is a clear indication of how deeply the people feel about this. For Congress to kill the amendment, to refuse to allow the people a chance to express their will, would be the worst form of elitism.

This grassroots desire to protect the flag is also expressed in public opinion polls—which run overwhelmingly in favor of the amendment—and in the ever-growing membership of the Citizens Flag Alliance. CFA is a national, non-partisan grassroots coalition working in support of the amendment. I am proud to serve on CFA's board of directors.

Let me close, Mr. Chairman, by urging this subcommittee and ultimately this Congress to listen to the growing voice of the American people who want our flag protected under the Constitution. If I thought for one minute this amendment would weaken or harm the First Amendment, I would not be sitting here today. But you have the unique opportunity to protect both the flag and the First Amendment. I urge you to seize that opportunity.

Thank you.

Mr. CANADY. Mr. Fein.

#### STATEMENT OF BRUCE FEIN, ATTORNEY AND COLUMNIST

Mr. FEIN. Thank you, Mr. Chairman and members of the committee.

I think the question of whether or not a constitutional amendment of the type proposed is warranted is not answered by taking public opinion polls. You are leaders, not followers. There was a poll taken thousands of years ago, in the city-state of Athens from the Athenian citizens who had heard the trial of Socrates and they voted the hemlock and I think history has not vindicated that public sentiment.

That doesn't mean that you necessarily reject public sentiment, either. And I don't think, either, that the decision whether the amendment is prudent or not turns on absolutes. Everything in life is a matter of degree. In different circumstances, at different times, it might be warranted to have a prohibition upon something that we might style political speech.

When you had open-ended political speech of every sort in Weimar, Germany, it descended and degenerated into Hitlerite nazism as well when speech, even though it might be styled political, lacked any resonance with what we call reason. And indeed even today in the Federal Republic of Germany, there is the political speech and insignia of the Nazi flag and its doctrines are banned.

We aren't in that situation in the United States, in my judgment. In the United States, after the *Johnson* case and after the *Eichman* decision, we aren't confronting any menace of flag burnings and indeed I think Congressman Frank has rightly pointed out that by passing the amendment which everyone expects would be followed by sequel laws prohibiting flag desecrations of some sort or an-

other, we would really be inviting these rather infantile, juvenile actions to be martyred in the eyes of the media.

And underscoring something that doesn't deserve underscoring in the law is not to say that we ought not, in vindicating our cultural values, impose what you might call voluntary social ostracism on those who, are quite willing and relish taking advantage of the liberties they enjoy because those prior to them displayed that last full measure of devotion, as President Lincoln said, so that this country could live free. It is an act of ingratitude more to be despaired than imitated.

I don't think the proper response is a constitutional amendment and criminal prohibitions. We have also, I think, lost sight of the fact that even under the *Johnson* and *Eichman* cases flag desecrations, when in the context they amount to fighting words that are calculated to provoke a breach of the peace under the *Chaplinsky* test or under the *Brandenburg* test are intended to provoke a law violation and are likely to do so, those kinds of flag desecrations maintain their punishment under law as is. You do not need a constitutional amendment to prohibit those flag desecrations.

I also think that as we revere certain symbols in this country, one that has been neglected, in my judgment, is the symbol of the Constitution. It is succinct. It is eloquent in language. If we go around amending the Constitution on every occasion we think the Supreme Court has erred, we will soon have a document as long as "War and Peace" and trivialize it.

Would we amend the Constitution if we think the Supreme Court defined obscenity with too narrow a focus on extractory organs and extractory acts, that well, even if you just had a smallion chrome of a private part, you could prohibit that even though it wouldn't fall within the *Miller* test? I think we would say, no, that is trivializing the Constitution, at least from what we know about the problems confronting the country today.

And you trivialize that revered document and I underscore that document isn't protected by prohibitions upon burning it. It is protected in the minds of the people because it is succinct and captures all that we hold very, very precious in ordering our polity.

I would just suggest that Congress—Chairman Hyde's proposal, which I think is an enlightened one to do something that reinforces the cultural unity at least at one point in a Nation of heterogeneity would be a positive celebration of the flag by having a Congressional Medal of Honor that is awarded to the individual who best exemplifies in that year the courage, the patriotism, the values of the country.

That is an affirmative act. It does provide a unifying force. It can have a celebration at the White House and yet I think it avoids what I would consider a misguided effort to do the same by prohibiting flag desecrations.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Fein.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN, ATTORNEY AND COLUMNIST

Mr. Chairman and Members of the Subcommittee, I am grateful for the opportunity to testify on a proposed amendment to the United States Constitution that would authorize Congress and the States to prohibit physical desecration of the flag

of the United States in circumstances that would violate the First Amendment as currently interpreted by the Supreme Court in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990). I sympathize with sponsors of the amendment. The United States flag is for tens of millions a symbol of that last full measure of devotion that so many have given to preserve freedom and liberty for their contemporaries and posterity. Indeed, we in this room today are beneficiaries of their sacrifices.

Those who would cast aspersion on the flag and its symbolic exaltation of the Nation's ideals through physical desecration like Gregory Lee Johnson display infantile and dishonorable sentiments. They glory in the exercise of free speech to denigrate those who fought to safeguard the liberties they enjoy. Their ingratitude is more to be marveled at than imitated.

While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a constitutional amendment would be a proper response. Flag desecrations when employed as "fighting words" or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky v. New Hampshire* (1942) and *Brandenburg v. Ohio* (1969).

Moreover, after brief media infatuation with flag burning abated, physical desecrations seem to have experienced a parallel diminishment and are not generally creating community havoc. Finally, physical desecrations are insufficiently menacing to the Nation's culture and values to warrant a constitutional amendment.

Outside the Bill of Rights, they have generally been reserved for fundamental issues related to the structure and powers of government and participation in the political process. The major deviation from this custom was the ill-starred Prohibition Amendment, and we should learn from that example. To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. An amendment is no more warranted than would be a revision to authorize the punishment of pornography or obscenity beyond the tight limits set by the Supreme Court in *Miller v. California* (1973) and *New York v. Ferber* (1982).

The United States Constitution has retained its inestimable public reverence substantially because of its succinctness and confinement to issues at the core of the Nation's political personality. It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision, which do not seem headed toward the endangered species list. As Hamlet soliloquized: "Rightly to be great is not to stir without great argument. . . ." Physical flag desecration is too insignificant to the public weal to justify stirring a constitutional amendment.

A more enlightened response would be a Congressional Medal of Honor to be awarded on Flag Day celebrating an individual who by words or deeds best exemplified the courage, patriotism, and ideals customarily associated with the flag. Physical flag desecrations protected by the First Amendment is a type of speech where the best answer is more speech that exposes its emptiness, not enforced silence.

Mr. CANADY. Professor Nagel.

**STATEMENT OF ROBERT F. NAGEL, IRA ROTHGERBER PROFESSOR OF CONSTITUTIONAL LAW, UNIVERSITY OF COLORADO**

Mr. NAGEL. Thank you, Mr. Chairman. I really am honored to be here.

Mr. CANADY. You need to turn your microphone on.

Mr. NAGEL. Now can you hear me?

Mr. CANADY. Yes.

Mr. NAGEL. I really am honored to be here this morning. I thank you for the opportunity.

What I want to say this morning is that, in my view, amending the Constitution to authorize flag-burning laws would not detract from the right to free speech. On the contrary, in my opinion, the amendment would strengthen freedom of speech.

I say this because that right, like all our liberties, depends ultimately on the core understandings and commitments of the American people. If the American public comes to the conclusion that the

freedom of speech is a fancy, intellectual pretense or a profoundly foolish dogma or some maneuver in the culture wars, the fundamental protection for this liberty will begin to fade away.

I believe that the Supreme Court opinion in *Texas v. Johnson* poses exactly this danger. It illustrates how far the specialized and ingrown thinking of lawyers has come to depart from common sense and general experience. The *Johnson* decision is to constitutional law what the O.J. Simpson trial is to the criminal justice system. The Court's reasoning may seem natural to many in the legal elite, but it is profoundly unconvincing to people who rely on everyday experience and a sense of history.

Most people know that virtually any act can be expressive. Everything from urinating in public to blowing up a building can be a political statement. Common sense tells us that the free speech clause can't apply to all such acts. Most people also have a justified skepticism about the Court's dark forebodings regarding a possible slide down the slippery slope from flag desecration laws to the generalized repression of dissent.

For eight decades the State of Texas had somehow managed to restrict its antidesecration law to protecting the flag, places of worship and public monuments. For judges to see in this the lurking face of totalitarianism seems to me to take leave of all sense of proportion.

Finally, most people are properly offended by the Court's self-important claim that judicially announced principles of tolerance can adequately serve the same unifying purposes as the flag. Realistic people know that, while a sense of nationhood is indeed built partly on ideas, including the ideas of civil libertarians, it is also built on deep emotions and symbols.

In sum, the reasoning used by the Supreme Court to invalidate flag-burning laws roots the Constitution in the shallow, esoteric doctrines of lawyers, rather than in the common sense, experience, and understandings of the people. If *Johnson* were an isolated departure, it would be a very unfortunate decision but it might not justify an amendment. It is, however, in important ways, very typical.

Just the other day, for instance, the Court determined that the integrity of the election process does not justify rules against anonymous campaign literature. This decision reversed the judgments of 49 out of 50 States. It found a threat to free speech in laws that have existed since the end of the last century and that have not in any visible way harmed or inhibited our system of vigorous public debate.

Similarly, in modern times, the Court has upended the established understanding that the States are free to regulate commercial advertising and defamation. It has significantly restricted the definition of obscenity. It has begun to regulate the historical authority of the States to punish fighting words. It has declared nude dancing and dial-a-porn services and campaign contributions to be protected speech.

In short, the flag-burning case is part of a sustained pattern of modern decisionmaking. That pattern threatens to cheapen and trivialize the right of freedom of speech. It is driving a wedge between the general public and the first amendment. Reversing the



flag-burning decision by constitutional amendment would powerfully remind judges across the country that the Constitution derives from "We the People." The amendment would help to preserve freedom of speech by grounding it in American practices and values.

Thank you.

Mr. CANADY. Thank you Professor Nagel.

[The prepared statement of Mr. Nagel follows:]

PREPARED STATEMENT OF ROBERT F. NAGEL, IRA ROTHGERBER PROFESSOR OF  
CONSTITUTIONAL LAW, UNIVERSITY OF COLORADO

My name is Robert Nagel. I teach at the University of Colorado Law School; I have been working in the area of constitutional law for some twenty years. It is a real honor to have this opportunity to give you my views on H.J. Resolution 79.

I want to address the major objection to Resolution 79. That objection, of course, is the belief that amending the Constitution to authorize flag protection laws would detract from the constitutional right to free speech.

In my opinion, the proposed amendment would strengthen, not undermine, freedom of speech. I say this because that right, like all of our liberties, ultimately depends on the understanding and the character of the American people. As long as the people value the right to participate in vigorous public debate, governmental restraints are likely to remain minor or transitory. But if the American public comes to the conclusion that the freedom of speech is a fancy intellectual pretense or a profoundly foolish dogma or a hostile maneuver in the culture wars, the fundamental protection for this liberty will begin to fade away.

In asserting this I am merely repeating one of the honored and continuing themes in our political history. From the time this nation was founded to the present, many eminent statesmen and jurists have argued that the people are essential guardians of constitutional limitations. As Judge Learned Hand said, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

Amending the Constitution to reverse *Texas v. Johnson* and *United States v. Eichman* would, I think, help to ensure that appreciation for freedom of speech lies securely in the hearts of men and women.

Those decisions are clear illustrations of how far the specialized and ingrown thinking of lawyers has come to depart from common sense and general experience. They are to constitutional law what the O.J. Simpson trial is to criminal procedure.

The *Johnson* opinion is built on three legal doctrines<sup>2</sup>: first, that burning a flag is speech rather than action because it is expressive; second, that permitting the government to punish flag burning would involve a real risk of generalized suppression because there is no principled way to distinguish between this behavior and other offensive behaviors; and, third, that flag protection laws are not necessary for preserving a sense of nationhood because that sense can be adequately protected through the kind of civil libertarian commitments represented by the Court's own opinion.

These propositions seem self-evident to many in the legal profession, but they are all profoundly unconvincing to people who rely on practical knowledge, everyday experience, and a sense of history.<sup>3</sup>

Most people—at least those who aren't lawyers—know that virtually any act can be expressive. Everything from urinating in public to blowing up a building can be a political statement. Common sense tells us that the free speech clause can't apply to all such acts. Perhaps the Justices in *Johnson* were implicitly arguing that they—and other judges—can be trusted not to extend the category of "speech" to absurd extremes. If so, they chose a poor occasion to ask for such faith, burning the flag,

<sup>1</sup> Learned Hand, *THE SPIRIT OF LIBERTY* 189-90 (1960). Madison and Hamilton early on argued that the people would be the ultimate guardians of the constitutional system. *The Federalist*, NOB. 15, 17, 44, 45. See also Robert Jackson, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80 (1955).

<sup>2</sup> For more detailed descriptions and criticisms of *Johnson*, see Nagel, *JUDICIAL POWER AND AMERICAN CHARACTER*, chs. 6, 8 (1994). See also Paul Campos, *Advocacy and Scholarship*, 81 *CAL. L. REV.* 817 (1993).

<sup>3</sup> Before *Johnson*, some 48 states had flag desecration laws. After *Johnson*, a nearly unanimous Congress enacted the Flag Protection Act of 1989. After *Eichmann* invalidated this statute, 49 states asked Congress to begin the amendment process so that flag protection laws could again be permissible.

after all, had never been considered protected speech from the beginning of the Republic until 1989 when the Court handed down *Johnson*.

Most people also have justified skepticism about the Court's dark forebodings regarding a possible slide down the slippery slope from flag desecration laws to generalized repression of dissent. For many decades the state of Texas had somehow managed to restrict its anti desecration law to protecting the flag, places of worship or burial, and public monuments. To see in this the lurking face of totalitarianism is to lose all sense of proportion.

Finally, most people are properly offended by the Court's self-important claim that judicially-announced principles of tolerance can adequately serve the same unifying purposes as the flag. Realistic people know that, while a sense of nationhood is indeed built partly on ideas (including the ideas of civil libertarianism), it is also built on deep emotions and symbols.

In sum, the reasoning that led the Supreme Court to conclude that flag desecration laws violate the first amendment is strained, even foreign, to the bulk of Americans. That reasoning roots the Constitution in the shallow, esoteric doctrines of lawyers rather than in the common experiences and understandings of the people.<sup>4</sup>

If *Johnson* and *Eichman* were isolated departures from the deeper and truer sources of constitutional meaning, they would be very unfortunate decisions, but they might not justify a constitutional amendment. They are, however, typical.

Just the other day, for instance, the Court determined that the integrity of the election process does not justify rules against anonymous campaign literature.<sup>5</sup> This decision reversed the judgments of 49 out of the 50 states. It found a threat to free speech values in laws that date back to the end of the last century.

Similarly, in 1976 the Court suddenly discovered that political patronage, a practice that goes back to the very beginnings of our country and that is widely believed to increase the accountability of government, is inconsistent with free speech.<sup>6</sup> In 1974 the Court set aside the defamation laws of nearly every state by requiring for the first time in our history that injured parties prove negligence.<sup>7</sup>

In modern times the Court has upended the established understanding that states are free to regulate commercial advertising. It has significantly altered the definition of obscenity. It has begun to restrict the historical authority of states to punish "fighting words." It has declared nude dancing and "dial-a-porn" services and campaign contributions to be protected speech. It has used free speech doctrines to limit the traditional powers of school officials, zoning boards, and prison administrators. It has found free speech issues in jacket patches, billboards, and license plates.<sup>8</sup>

The flag-burning cases are, in short, a part of a sustained pattern of modern judicial decisionmaking. That pattern threatens to cheapen and trivialize the great principle of freedom of speech. It is driving a wedge between the general public and the First Amendment. Reversing the flag-burning decisions by constitutional amendment would, I think, powerfully remind judges across the country that the Constitution derives from "we the people." The amendment would help to preserve freedom of speech by grounding it in American practices and values.

Mr. CANADY. Mr. Fein, you started off your testimony indicating that we shouldn't be governed by polls. And I agree that we cannot simply look to the transient reflection of public opinion in an opinion poll to determine what the content of the Constitution should be. But don't you think that we should give significant weight to the fact that 49 State legislatures have called on the Congress to address this issue?

<sup>4</sup> For a general treatment of this subject, see Nagel, *CONSTITUTIONAL CULTURES* (1989).

<sup>5</sup> *McIntyre v. Ohio Election Commission*, 63 LW 4279 (1995).

<sup>6</sup> *Elrod v. Burns*, 427 U.S. 347 (1976). See also *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990).

<sup>7</sup> *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

<sup>8</sup> See *Virginia Bd. of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976) (advertising); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (fighting words); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing); *Sable Communications, Inc. v. F.C.C.*, 109 S. Ct. 2829 (1989) ("dial-a-porn"); *Buckley v. Valeo*, 424 U.S. 1 (1976) (campaign contributions); *Tinker v. Des Moines Indep. School District*, 393 U.S. 503 (1969) (schools); *City of LaDue v. Gallo*, 114 S. Ct. 2038 (1994) (zoning); *Pell v. Martinez*, 416 U.S. 396 (1974) (prisons); *Cohen v. California*, 403 U.S. 15 (1971) (jacket patches); *Metromedia, Inc. v. San Diego*, 435 U.S. 490 (1981) (billboards); *Wooley v. Maynard*, 430 U.S. 705 (1977) (license plates).

I mean, that is not just an opinion poll. That is the people acting through their State legislative bodies almost unanimously calling on us to address this issue. And don't you think it would be in some ways arrogant of us to ignore the call of 49 States on this issue and not give the States an opportunity to amend the Constitution pursuant to article V?

Mr. FEIN. No, I don't think that you would be acting arrogantly if you decided that despite sympathizing with the aspirations of those petitions you thought, ultimately, they were misguided. Similar polls were taken whether Galileo should get housed in prison for teaching that the Earth wasn't the center of the universe and that the sun was.

Mr. CANADY. Again, let me—you want to talk about polls. What I am asking about is not the polls but about the official actions of 49 State legislatures.

Mr. FEIN. Yes.

Mr. CANADY. I don't think they ever voted on Galileo.

Mr. FEIN. I agree with that. But I don't think, unless you are convinced by the reasons for a constitutional amendment that you necessarily are acting arrogantly, if you decided that they were misguided. That is Edmond Burke. Remember when he explained to his Bristol constituents that they gave him an independent judgment that he was to exercise, he wasn't to be simply a robot who chalked up what his constituents said was desirable, whether they were polls or local council meetings or otherwise and then abandon his judgment?

I am not saying that you should ignore 49 State petitions. You should read them, but you should give them the weight that the reasoning compels and not just count public opinion. I think that is what makes you a leader rather than a follower and you have a duty, since you are the initiators of the amendment process, to exercise a leadership role, not a followership role.

Mr. CANADY. Mr. Nagel, would you care to comment on that subject and the significance of the action by this—the State legislatures on this subject?

Mr. NAGEL. I think, in a way, Mr. Fein is right. I think you should exercise your judgment on the underlying reasoning behind those petitions and I think once you do that, once you think about why so many people in this country are of the same view on this issue, then I think you ought to accord them the respect they are entitled to and put the amendment forward.

Mr. CANADY. Thank you.

Mr. Frank.

Mr. FRANK. Mr. Nagel mentioned that in Texas, the law that apparently was invalidated—I wasn't aware of this—prevented the desecration of the U.S. flag in places of worship and public monuments. Is that correct?

Mr. NAGEL. Yes.

Mr. FRANK. So what we would do now would be to restore the right to Texas to prevent the desecration of the flag but they would not be able to prevent the desecration of public monuments and places of worship so they would be desecrable under this amendment, correct?

Mr. NAGEL. I don't think, sir, that *Texas v. Johnson* removed the authority of the State of Texas to punish desecration of public monuments or places of burial.

Mr. FRANK. You mentioned it and I—but that was irrelevant to the decision?

Mr. NAGEL. Pardon me, sir?

Mr. FRANK. You don't think this was implicated by the decision?

Mr. NAGEL. No, it was not—only the part of the law that had to do with flag-burning.

Mr. FRANK. It wasn't relevant to the issue. I thought when you mentioned it, it had some. People keep talking about flag-burning. Let me ask—burning is easier to deal with than the broader context of desecration and these are the kind of problems we have to cope with.

Mr. Cronauer, if the amendment were to say flag-burning or flag—well, I don't know, what about if it just said flag-burning, would that be for you an acceptable way instead of desecration?

Mr. CRONAUER. I think there is a strong feeling among the people generally about any form of desecration.

Mr. FRANK. I am asking you now.

Mr. CRONAUER. My personal opinion?

Mr. FRANK. I will be out with the people and they will tell me about what they think. Some people are here from Massachusetts and they will tell me in 10 minutes which I am glad they do. I was asking you and not the people.

Mr. CRONAUER. My personal opinion is, it should be flag desecration, generally.

Mr. FRANK. What if someone wrote on a flag, really abusive things about the Federal Government? Would that be desecration in your mind? Could a State under this amendment, could a State do that? We have people telling me now and people say we should listen to public opinion and, you know, in the long run, if we don't listen to public opinion, we get a lot of time on our hands. So we listen to it. The question is, through what kind of filter and with what time period?

One of the things I hear from the people in the public, they distrust the Government, they think the Government is not acting in their best interest. Do we want to give the Government, Federal and State, the power to punish people who write things on an American flag that we find offensive? Because I understand this amendment would do that.

Mr. CRONAUER. Congressman, I am not sure what this amendment, when you get down into the nitpicking particulars, would or would not allow. That is up to each individual State or the Congress when they pass the legislation to figure it out. And you could—you could come up with a whole lot of parade of horrors and do a complete reductio ad absurdum to the point where you were doing the same thing with the ERA.

Mr. FRANK. I object to that. I am not doing a reductio ad absurdum. I am talking about what it says. That is just an unfair response. This is a difficult issue and I think caricaturing what each other is saying is not helpful. Desecration means more than just burning and it clearly means writing certain things on it. That is inherit, this is the problem.

I don't think, with all respect, Mr. Cronauer, it is to say, I don't know what it will mean. That is our job. If desecration is too broad, maybe we should try to narrow it some. But I ask if a State decided under this that it could prevent you from writing, having a political poster, a sign, holding up a flag with terrible things about the Government or about particular people in the Government written on it, would you think a State should be able to make that illegal?

Mr. CRONAUER. Well, Congressman, I think it is up to you as—if you are passing a law in Congress or up to individual State legislatures to spell that out, and I am sure that when it is spelled out, it would may very well go back to the courts again to try and figure out exactly what is and is not, and I think that's what we are doing here is just setting up the basic principle.

Mr. FRANK. I would like to ask Mr. Fein. Mr. Cronauer, that is our problem. That is perfectly reasonable when you are expressing yourself, when you are making statements. But when you are amending the Constitution, you are asking us to tolerate a degree of ambiguity. That scares me.

Mr. Fein.

Mr. FEIN. I agree exactly, Congressman. Even though I would expect that if a State or the Congress sought to follow up if the amendment was ratified with perhaps some kind of more particular definition than flag desecration, it might well be a violation of the due process clause of the Constitution if there were not some tightening definition to provide fair warning.

This amendment does not purport to seek to change the due process requirements of the Constitution and it shows you how you are going, I think, to invite a bramble bush of sequel litigation which isn't invariably to be opposed, but you have got to ask, but what are we gaining from it? Is the game worth the candle here?

Mr. CANADY. The gentleman's time has expired.

Mr. Hyde.

Mr. HYDE. Well, we are going to have to vote. This has been a great panel, very instructive, as has the others. An interesting issue.

Bruce, let me ask you this. The fact that free speech is still untrammelled as free speech or, as you lawyers say, qua free speech, we are talking about one form of so-called symbolic speech that we wish to proscribe. But we are not impairing nor impeding free speech as speech.

If you want to trash this Government in any way you want, it may be use rap lyrics to do it like Time Warner does, they won't read them themselves over the air but they will make a lot of dough, that is fine, go right ahead, more power to you. But it is just using flames to destroy and disparage and desecrate something that has immense, let's say, sentimental—that is a trivializing word—value to people.

Freedom of speech is still intact, is it not, or are we—

Mr. FEIN. Yes, I agree. I do not think that the flag-burning amendment, even though I wouldn't support it, I don't think it really outlaws or punishes a person's ability to say anything or convey any idea. Indeed, every idea that is conveyed by burning a flag can clearly be conveyed without burning the flag using your vocal

cords, for example, and therefore it doesn't, in my judgment, threaten to dry up rich political debate. That is not the reason why I think this is an imprudent gambit.

I don't think that it is wise to amend the Constitution every time you think that the Supreme Court has done something wrong when the issue, the problem, I think, is so inconsequential and it invites new problems, the first problem it invites is martyrdom of flag-burners.

Mr. HYDE. A very legitimate point of view.

Mr. FEIN. The second problem it invites is all the kinds of litigation I think as Congressman Frank and Congressman Serrano said what is a flag. How about a flag with 49.5 stars rather than 50? How about a flag with 12 stripes rather than 13? All those kinds of things are not going to be, in my judgment, capable of any sensible resolution even in a followup statute. So you have to ask, even though—

Mr. HYDE. Desecration is desecration. And that—I think that—

Mr. FEIN. No, it is desecration of the flag. Suppose you burned a flag that had 49 rather than 50 stars on it.

Mr. HYDE. I would just say you can't count.

Mr. FEIN. But a court—but when you criminally—you can't get away with that, Congressman, when you have got a criminal punishment at issue. You have to have a fair point.

Mr. HYDE. Can I ask you one question, Bruce, because we have to run. Professor Nagel said campaign contributions are an expression of free speech. If that is so, the limitations on what you can give a candidate must be unconstitutional.

Mr. FEIN. And in some—some respects, the court has held expenditure side can be unconstitutional. On the contribution side, it said, well, there is an offsetting danger here, an appearance of corruption. That is the way they justified in *Buckley* and *Valeo*, setting limits on contributions. Whether or not you want to impose them as legislators is a matter of discretion. The court—

Mr. HYDE. I see restrictions on free speech here if it is campaign contributions, but if it is the flag, anything goes.

Mr. FEIN. Well, I understand and I have questions about whether or not Joe—whether or not the *Johnson* case was decided correctly. I think it is a close decision. After all, he was someone who denounced the Republicans. Every political idea he had encountered in Dallas before he burned the flag, he was denounced. He wasn't touched for that.

He did burn the flag in circumstances which might arguably have fallen within the fighting words standard of *Chaplinsky*. Remember under those decisions, you can still ban flag-burnings that are "fighting words." You can still ban flag-burnings perhaps that are intruded into circumstances where the flag-burner intends to provoke a breach of the peace and he is likely to do so. That stuff remains prohibited.

I want to say, however, I agree with you that those who are exaggerating that somehow we are sticking a stiletto into our free speech by this amendment are grossly exaggerating it. On the other hand, I think to claim that without the amendment, there aren't any other ways in which we can revere the flag affirmatively



with Government sanction, medals of honor, teaching instruction that continues to try to make some unifying force out of this.

Mr. HYDE. Mr. Fein.

Mr. FEIN. Out of this symbol, it is wrong-headed, too.

Mr. HYDE. I have known you for many years. I have followed your career with great interest and I hate it when we disagree.

Mr. CANADY. There will be two votes that will be held on the floor. We can come back after the votes or members may submit written questions.

Mr. CONYERS. Mr. Chairman, you have agreed that this is an important hearing. Why don't we all get a turn at the witnesses?

Mr. CANADY. Oh, if that is the desire of the members, that is what we will do.

Mr. CONYERS. It is always the desire of the members on this side.

Mr. CANADY. Well, that has not been my experience in the past, but we will certainly be happy to come back after the vote and—

Mr. FRANK. I would just say to the chairman, I think we should come back. But there have been times when the copyright law was before us when I was willing to forgo coming back.

Mr. CONYERS. This isn't copyright law. This is constitutional law.

Mr. CANADY. As I said, we will be happy to reconvene this hearing after the votes on the floor.

The subcommittee stands in recess.

[Recess.]

Mr. CANADY. The subcommittee will be in order.

Mr. Conyers, you are recognized.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to say to the chairman, I appreciate this opportunity to discuss this matter with the distinguished witnesses, and I apologize for any inconvenience that it may have caused any of them in terms of staying here.

Professor Nagel, you have concluded your testimony with a long list of things that apparently you don't think the courts were doing right in terms of regulating commercial advertising, changing the definition of obscenity, modifying the authority of fighting words, considering campaign contributions as protected speech, and then curiously you say that flag-burning case is part of this sustained pattern of judicial decisionmaking that cheapens and trivializes the great principle of freedom of speech.

I find that—if you are just linking your long list of complaints and adding freedom of speech at the end of it, I don't think you are doing this subject matter much good. And I agree with your right to take issue with the Supreme Court, but I don't believe reversing flag-burning decisions by constitutional amendment remind judges that the Constitution derives from "We, the People." I don't think that is the point at all. That is certainly not why we are here.

Why don't we limit the terms of justices since we are into term limitations or why don't we go about it some other way, but I think that this case, and this constitutional issue separates itself in very important ways from the other list of cases that you have attached the flag-burning issue to, and I am sorry that you approach it from that point of view because it reveals, you know, your State of mind more than it does any good for the constitutional question that we have before us.

Mr. NAGEL. May I respond to that?

Mr. CONYERS. I would love to hear you.

Mr. NAGEL. I want to clarify, Mr. Conyers, that I don't disapprove of each of those opinions. In other words, some of those results I might personally—

Mr. CONYERS. You support them?

Mr. NAGEL. No, let me explain. I might approve of some of them specifically and some of them not, but what I think characterizes all of them, what is common whether I happen to like them or not, is that they all make it difficult for the general public to see the sort of essential core constitutional principles at stake. And so they tend to remove, those opinions tend to remove the Court's jurisprudence from general public understanding. That was the point I was trying to make.

I agree with you that the flag-burning decision is different from those decisions as a matter of degree. It is much more difficult for people to assimilate, and there is an extremely strong emotional and visceral response that occurs with respect to the flag-burning decision.

Mr. CONYERS. Well, Professor Nagel, why would you think that us doing what we are being urged to do here today about flag-burning would remind judges about the Constitution? I mean, I don't really think that they are going to be reminded about anything. They know that we can do this if we choose.

The question is, is it wise, and Mr. Cronauer, distinguished and famous celebrity that you are, I don't know where you thought that getting an honest job would be going into lawyering and leaving the acting profession, but I think the record has to be corrected on that. You made one heck of a big mistake if that is what you thought you were doing.

Frankly, I liked your views earlier before you started out touring the country and found out how the flag was so vital, loved by everybody. I didn't know you didn't know that before you started traveling, and it really—I hope that your change of decision isn't as accurate.

Mr. CANADY. The gentleman's time has expired. The gentleman will have 2 additional minutes, without objection.

Mr. CONYERS. Thank you, Chairman Canady.

I hope that the reversal of your opinion on this subject that occurred after you went to law school doesn't get any more clouded as you proceed in your new and honest career. I am delighted to have you here, of course, but I could have told you how strongly people felt about the flag when I was a little kid before I ever got to law school, and I knew it was a great symbol and it was special, but so what else is new?

You know, we have had witnesses—and Members forget that the first constitutional case that came down was *Marbury v. Madison*, when the first Chief Justice in history said that the Supreme Court reviewed the constitutionality of congressional law. Even us, we get reviewed by them. Who else should it be?

I mean, in this system that we have, I think it is a pretty good one, and Lord knows I have probably disagreed with more recent Supreme Court decisions than you ever have, and it is not conserv-

ative or liberal in this issue, and I would like you to respond to my several points that I have made in the form of a rough question.

Mr. CRONAUER. Well, Congressman, first of all, I would say being a lawyer is an honorable profession if you do it right.

Mr. CONYERS. But honorable and honest, that is two different things.

Mr. CRONAUER. Both, I think.

Mr. CONYERS. Well, it is refreshing to know that at your age you can come into this profession feeling like that.

Mr. CRONAUER. Well, a couple of things I would respond to and that is that I have always felt that the flying the flag was held dear by people, but it is only over the past 5 or 6 years that I have realized that people are so upset over the issue of flag desecration.

Mr. CONYERS. Well, let me tell you something, sir. This issue hadn't come up around here in quite a while, and I would like to suggest how it came up.

We just ran out of the 100 days, the contract has been dealt with, and guess what? We were looking for a popular issue that nobody would complain much about, and, right, the flag, flag-burning, and I would like to invite all of our friends here that are at this hearing to identify when all the flag-burning activities that have gone on because we are trying to build a record on that, and let me yield to Professor Fein.

Mr. CANADY. I am sorry, the gentleman's time has expired. Would you like an additional minute?

Mr. CONYERS. Yes, sir, and I thank you for it. I would like to recognize Professor Fein at this point.

Mr. CANADY. The gentleman is recognized for 1 additional minute, without objection.

Mr. CONYERS. Thank you.

Mr. FEIN. First, with regard to lawyering being an honest profession, I would recommend "Bleak House."

Mr. CONYERS. Could you turn on your microphone, sir.

Mr. FEIN. I would recommend "Bleak House" for those who might want to get probably a more accurate portrayal of the profession.

With regard, I think, however, to, Congressman Conyers, your point about how we should either voice objection to or invite greater public impact on Supreme Court decisions, I think it is an acute point because those who say, gee, this is a good shot across the bow really what they are debating is maybe what is the appropriate power of the Supreme Court, but that debate is misguided regarding an amendment that narrowly relates to flag-burning. It says maybe Congress should be able to overrule Supreme Court decisions that they think are misguided.

Now, those proposals were—and they have been around and flirted with for a long time, but if the real issue isn't really flag-burning but you have got to get the Court back in check, then I think that is the appropriate context in which to raise it is elsewhere. If it is a good idea, let's face it, the Court has created a lot of disgruntlement far beyond flag-burning.

Mr. CONYERS. Exactly right, and that is why Professor Nagel's long list to which he appended flag-burning and suggested that we have—that we reverse the judges just to show them who is boss

around here may not be the most thoughtful way that we want to proceed about this question.

Mr. CANADY. The gentleman's time has expired.

Mr. FRANK. Would the gentleman yield for 10 seconds?

Mr. CONYERS. I only have 9, but I will yield.

Mr. FRANK. Maybe we should add to Supreme Court decisions that we don't like corrections day.

Mr. CANADY. Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman.

I think every panel, as well as this panel, is in agreement that we can do this, that the Nation can make this amendment. I think what we have come to is a question of should we, and so I take you back to Chairman Canady's comments before we had the break. It now seems like quite a long time ago, but I remind you of the thoughtful examples offered by Mr. Frank and Mr. Serrano of where this is going and what is the logical progression of this amendment.

In that context I ask the following question because we have discussed in the judiciary, in markup and hearings, many times and there is some disagreement here. I wish to take advantage of you thoughtful legal and constitutional scholars to ask you about our role, and that is in the context of this particular circumstance where 49 States have stated affirmatively that we should do this: What is the proper role of Congress insofar in the amendment process? Are we to be as some suggest merely the mailman and send it on its way, or are we to thoughtfully decide and actually make this decision in and of ourselves irrespective of the States and hope that they will follow suit, or does the proper role lie somewhere in between and what should the two-thirds vote be based on?

Mr. FEIN. I think, Mr. Congressman, there was at least a consensus that 49 petitions mean something, but they ought to mean what the substance of the reasoning behind the petitions are. We just don't count it up. You look at it, and if it is persuasive, then exercising your independent judgment you find it persuasive. If it is not, I don't think you are beholden to going forward.

You are in the position, as I think Edmund Burke described his position, as representing those citizens in Bristol. He didn't renounce his judgment. In fact, that is what he was there for to exercise his judgment, and you should give whatever weight you think appropriate to the reasons advanced for the need for the amendment which are forthcoming in those petitions. But I underscore, I think the problem we have got today in so many of our legislators is that they think they are followers, not leaders. You are here to lead, and to lead means to exercise an independent judgment.

Mr. CRONAUER. Congressman, I was going to suggest that the function of a Congressman is to represent his constituency. In cases involving constitutional amendments, there have been lots of constitutional amendments proposed, some of them with very little support, but this particular amendment has such an overwhelming public support compared with others that have been proposed recently that I would suggest and submit respectfully that it would be proper for a Congressman to listen to the voice of his constituency who are clamoring for this amendment.

Mr. FEIN. Could I interject this because I think this is important. You are not sitting here as the sole cutoff point for this public opinion. The Constitution in article V recognizes an alternate route. If Congress isn't moving fast enough, the States can petition, two-thirds of the States can petition for constitutional convention to draft language that then goes out as an amendment. So I don't think you are in the position of saying, ah, if we decide not to go forward, that ends the game. No, the States, if they truly care, have that alternate mechanism.

Mr. FLANAGAN. I guess the question I am asking that is not really being addressed here—perhaps I have asked it badly—is in the context of article V and in the amendment process where two-thirds of the States are required and two-thirds votes out of this body and the other body, where is the delineation of true power there? Is this an action by the Congress hoping the States will follow along, or is this an action that really is left to the States that the Congress merely initiates?

There is much division of opinion that we have to like it, bless it, really want it first, and then the States can do with it what they want, or we are here to take a thoughtful and suggestive amendment to the Constitution, something that might or might not ought to be there, but we are to let the States make a decision on whether they ought or ought not to pass on through the process of ratification in each individual legislature. It is a keeper question whether to vote the will of the people or vote the district or vote your conscience or vote the interests of the Nation or vote to pass the issue to the States. It really is a question of constitutional magnitude that we wrestle with regularly here.

Mr. FEIN. I think if you look at the structure of article V, where you have got two routes, one route is governed and controlled solely by the States, you get two-thirds of the States, constitutional convention, the language comes back you need three-quarters for ratification.

Then you have an alternate route that is a Federal-State route; namely, Congress votes two-thirds, then States need three-quarters, suggests that Congress is not viewed, should not be viewed insofar as it is going to play a role in article V as simply opening up the gates for the States to consider because that uniformity of State control already exists as an alternate method where the States can force an—

Mr. FLANAGAN. Let me listen to Professor Nagel.

Mr. NAGEL. Well, I pretty much agree with what Mr. Fein said. I think under this particular route you should exercise your own independent judgment on whether this is a wise amendment, and I think that would be contrasted with the other procedure under article V where I think you are under more of a sort of obligation to follow the direction of the States.

Mr. CONYERS. Mr. Chairman, could Mr. Flanagan get 2 additional minutes?

Mr. CANADY. Without objection, Mr. Flanagan will have 2 additional minutes.

Mr. FLANAGAN. Could we hear from Mr. Cronauer, first, Mr. Conyers?

Mr. CRONAUER. Unfortunately it is not possible, as I understand the constitutional process, amendment process, to have a constitutional convention that would only address one single issue, and by just calling it a constitutional amendment you are opening up a very horrendous bag of worms.

Mr. FEIN. That issue I don't think is at all categorical. There has not been an attempt before. Indeed, the State initiated process has never actually been utilized, but I think the more persuasive argument is if the States all propose an identical language, a convention to draft an amendment to be sent out, you would not have what is called a runaway convention. And indeed, as you well know, in the Judiciary Committee there have been proposals that in fact would govern conventions demanded by the States that would prevent that. Anyway, at a minimum, the issue that has been broached here is an open one.

Mr. CONYERS. Would the gentleman yield?

Mr. FLANAGAN. Yes, Mr. Conyers.

Mr. CONYERS. Just briefly, I wanted attorney Cronauer to know that the first thing that hit the floor this year was a constitutional amendment. It was called the balanced budget amendment. It had great popular support. It went nowhere.

So, you know, 49 States or the great majority, we started thinking about that, and ironically it was Republicans that put the lid on the balanced budget amendment. So I am impressed that 49 States want to do something about this, and that the majority of the people want to do something about this, but, you know, how many people have studied constitutional questions?

I keep learning that more people have more literature and information and news available to them and are using less and less of it almost annually.

Mr. FLANAGAN. Thank you. I yield back.

Thank you, Mr. Chairman.

Mr. CRONAUER. Mr. Chairman, would it be possible for me to submit for the record later on some material on the flag-burning issue, recent attempts, incidents of flag-burning?

Mr. CANADY. Without objection, the material will be received and placed in the record.

Mr. Frank.

Mr. FRANK. I just want to express my appreciation to these witnesses. This is what hearings are supposed to be like. We have an issue here that a lot of people feel deeply about, and our own Members, and both panels, really treated this seriously. I express my appreciation to you and to them. This ought to be the norm. It unfortunately isn't, so I appreciate—nobody was impugning anybody's motives, nobody was doubting anybody's good faith. It is a difficult question, and I think it was treated appropriately.

Mr. CONYERS. Will the gentleman from Massachusetts yield briefly?

Mr. FRANK. Yes.

Mr. CONYERS. I join him in thanking the witnesses and the Chair for his admirable handling of this matter. Now the question before us, of course, is, what do we do next, and that I understand, it is not quite clear to me, is there a markup tomorrow on this subject?



Mr. CANADY. Yes, there is a markup at 10:30 tomorrow morning on this subject.

Mr. CONYERS. And are there witnesses as well scheduled?

Mr. CANADY. No, the hearing was today. The markup is tomorrow.

Mr. FRANK. I think that maybe there is a hearing tomorrow but it is on the oversight of the Civil Rights Division, not on this issue.

Mr. CANADY. This subcommittee has a separate hearing on a different subject tomorrow afternoon at 1.

Mr. CONYERS. OK. Well, Mr. Chairman, since we have been overly fulsome in our praise toward your handling of this measure, might you not consider that less than 24 hours from now, with attorney Cronauer submitting additional information from the record, the stenographer's expedited copy will just barely be getting back to us?

Wouldn't it strike you that we might need a little time to digest even some of the comments that I might not have appreciated fully at this hearing, that we let a little time elapse for us to get up to speed on the literally more than a dozen questions that I have noted to my staff that ought to be taken into consideration that I need some enlightenment on?

Mr. CANADY. Well, Mr. Conyers, I agree with Mr. Frank's characterization of the hearing. I think it has been a productive hearing. I believe the witnesses on both sides of the issue have done an admirable job in expressing the issues that are at stake.

I will point out that this is an issue which has been around for quite some time. There have been hearings in the Congress previously. I believe you were here.

Mr. CONYERS. But you weren't.

Mr. CANADY. At that time.

Mr. CONYERS. Sir.

Mr. CANADY. Well, I appreciate your being concerned about my ability to evaluate the issue. I believe that I have had an adequate opportunity to evaluate the issue, and if you would like information from the prior hearings, we would also be willing to help make that available to you, and to any other members of the committee, but I believe that we have had a full airing of this issue.

I think—obviously in any issue we deal with there are going to be questions. That is not true just of constitutional amendments; that is true of any statute that we pass. But I think it is true that this issue has been discussed quite adequately. I think the lines are pretty clearly drawn, and there are some basic differences of opinion. And let me say this, I respect the people who don't agree with this approach. I simply disagree with them, but I think the lines are pretty clearly drawn, and I think we understand what this is about.

Mr. CONYERS. Mr. Chairman, one final intervention, please. First of all, I agree with your characterization and Barney Frank's of this hearing. As a matter of fact, I said this much when I asked the gentleman from Massachusetts to yield.

The question that we are raising now is, should—I mean, have all the questions that were raised now been disposed of in our mind, and there is nothing to be gained from—I wanted to suggest—

Mr. CANADY. Mr. Conyers, I am sure that some of these questions will never be disposed of in the minds of some people. I cannot be responsible for that.

Mr. CONYERS. I wouldn't want to do that on a person of as tender years as yourself, sir. I wouldn't impose that burden on you. But what I would like to do is, there is one witness that seemed to be missing that was very important, and that is the American Civil Liberties Union, and it was my hope that we could get one analysis of that kind.

Mr. CANADY. Let me say this.

Mr. CONYERS. Is that fair?

Mr. CANADY. Mr. Conyers, we have worked very closely with the minority in formulating the witness list for this hearing. I understand that there was one witness for the minority whom we had invited who declined ultimately to testify. That was not at my suggestion. We reiterated to that witness that he was invited to be here and was certainly welcome. So far as I know there was never a request made to us to have——

Mr. FRANK. Will you yield?

Mr. CANADY. Yes, I will yield to Mr. Frank.

Mr. FRANK. The chairman is absolutely right. No one on the minority side asked me. As the ranking minority member, I spoke. We tried to get a balanced list of witnesses. I didn't include the ACLU in the list and no one asked me to. We can't cover everything, so the chairman is absolutely accurate in that regard.

Mr. CONYERS. Well, what about a day's respite to examine the issue, the stenographic transcript. Would that offend the chairman in his rush to dispose of this matter? I mean, one day? I mean, I could at least go over some of the responses made. I do observe that a number of members of the subcommittee were not here. I don't know how they are going to mark up anything at 10:30 tomorrow morning.

Mr. CANADY. Well, again, Mr. Conyers, it has been my experience that we frequently mark up bills when not all members of the subcommittee have been present at the hearings. That has been my experience. I make it my practice to attend subcommittee hearings whenever possible. I believe most of our members do that as well, but I understand you have a different perspective on this.

We, I believe, have had a full and fair airing of this issue, and ultimately we are going to have some disagreement on this, and we will mark up the bill and proceed. Again, I want to thank each of the members of this panel for being here.

I do think that your testimony has been very valuable. We appreciate your taking your time and appreciate your staying through the voting that was going on on the floor. Thank you very much.

The hearing is adjourned.

[Whereupon, at 1:05 p.m., the subcommittee adjourned.]

## APPENDIX

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### MATERIAL SUBMITTED FOR THE HEARING

STATEMENT OF DANIEL S. WHEELER, PRESIDENT, THE CITIZENS FLAG ALLIANCE, INC.

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to make these remarks in support of a constitutional amendment which would permit the states and the federal government to enact laws to protect the American flag from physical acts of desecration. The 102 member organizations making up the Citizens Flag Alliance Inc., representing more than 30 million Americans, are united in their resolve to see that the will of the vast majority of the American people becomes law.

The Citizens Flag Alliance Inc. was launched by The American Legion in June of 1994 for the sole purpose of generating national support for this amendment. Since that time, we have enlisted the support of 101 other national organizations, ranging from the Elks to the Navajo Code Talkers to the African-American Women's Clergy Association and the Gold Star Wives.

Mr. Chairman, I do not presume to be a constitutional scholar, steeped in the intricacies of constitutional law. What I do know, however, is what the American people are saying about this proposed amendment. I know that five Gallup surveys conducted since 1989 consistently show that no less than 80 percent of those polled nationwide favor a flag protection amendment. I know that 49 state legislatures, representing 99.8 percent of the American population, have passed memorializing resolutions calling on the Congress to pass this amendment and send it back to the states for ratification. I know also that this amendment enjoys bipartisan support, not only here on Capitol Hill, but also nationwide, as evidenced by those 49 state legislatures, some with Democrat and some with Republican majorities.

This amendment should not be a divisive issue—rather, given the overwhelming public support for it, the amendment, like our flag, should serve to unite us. If there is one symbol that brings all of us together in these trying times, surely it is our flag. The American people have consistently said that our flag deserves constitutional protection. Congress should heed that voice and send this amendment back to the states for ratification.

There are those who argue that passage of this amendment would lead us down a "slippery slope" toward muzzling free speech. To them, let me say that this amendment is not about speech, but about accountability for one's actions. One will still be able to say or write anything he or she wants about the flag, no matter how obnoxious or repugnant. Under this amendment, the states would be able to set penalties for physical acts against the flag such as burning or other acts of purposeful destruction. No one's First Amendment rights are abridged in any way.

There are those who oppose this amendment on the grounds that amending the Constitution is something reserved to the Courts or the federal government. Such is not the case. Our Founding Fathers recognized that times would change and the Constitution would have to change with those times. That is the purpose of the amendment process—to allow the will of the people to be exercised. Without the amendment and ratification process, we would not have enacted the Thirteenth Amendment which ended slavery. We would not have had the Fifteenth Amendment, which permitted former slaves to vote nor the Nineteenth which permitted women to vote. In each of those instances, it was the will of the overwhelming majority of the American people being exercised. We now must heed the will of the American people once again and enact this amendment.

We stand today at the threshold of a new time; we approach a new millennia and, once again, the American people are united in their call for change. They want their flag, the symbol of their country, protected. We protect other national symbols, such as the Lincoln Memorial, the Washington Monument and the Capitol building itself

from acts of vandalism and mutilation. Old fashioned logic and millions of Americans say that our flag deserves the same protection. Mr. Chairman, I would be remiss in my duties as President of the Citizens Flag Alliance if I did not stand up for our flag. This Congress will be remiss in its duties if it does not pass this amendment. If Congress will not stand up for our flag, what does that say to the American people?

Earlier this year, we celebrated the 50th anniversary of the U.S. Marine's battle for the Pacific island of Iwo Jima. We have all seen that most famous of all combat photographs—the flag raising on Iwo Jima. Here in Washington, we have the Marine Corps Memorial, a marble and bronze tribute to those brave men. It speaks quiet volumes about the sacrifice of those men and all who fought to overcome tyranny and evil in WW II. We honor their sacrifice, we praise the survivors and pledge that their sacrifice will not be forgotten. We trivialize and diminish their valiant service if we fail to enact this amendment.

Mr. Chairman, in closing, let me say that we stand taller as a nation when we stand united to redress our shared grievances. No other issue in recent history unites us as a people more than the issue of protecting our flag. The American people know it is wrong to burn or in any other way physically desecrate our flag. This amendment redresses that grievance and reflects the will of the American people. I urge this Committee and this Congress to adopt this amendment and listen to the voice of the American people.

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STATEMENT OF JOHN J. GEOGHEGAN, LEGISLATIVE ASSISTANT, MILITARY AND  
GOVERNMENT RELATIONS, AIR FORCE SERGEANTS ASSOCIATION

Mr. Chairman and distinguished committee members, a recent Gallup Poll confirmed that 70 percent of the American people favor legal prohibitions on purposeful acts of physical desecration of the American Flag. All but one state have passed a memorializing resolution supporting flag protection. H.J. Res. 79 would give the American people the opportunity they desire to protect their flag through law. At the very least, it would put this important decision in their hands and enable an accurate reading of the "will of the people." The 160,000 members of the Air Force Sergeants Association urge you to support this resolution. AFSA represents the millions of active duty and retired enlisted Air Force, Air Force Reserve, and Air National Guard members and their families.

For all military members, the flag represents the principles for which they are prepared to sacrifice. For those stationed overseas, it is a symbol of America, seen every day. Most importantly, the flag plays a central role in ceremonies that honor those who have fought, suffered and died. Allowing desecration of this important symbol of sacrifice insults the memories of those who are honored in these ceremonies.

For enlisted military members who work with sacrifice and dedication, the flag is a reminder of why they serve. Despite their lower pay and compensation, they serve for reasons far greater than personal gain and gratification. They serve so that they can protect this country, putting their lives on the line if necessary, and they revere our nation's most visible symbol—Old Glory. It is the one hallowed symbol all patriots hold sacred. Through their sacrifice and dedication, they have earned your support in giving them the ability to protect this symbol.

Perhaps the flag's importance was best described by Union Army Major General Arthur MacArthur:

The flag . . . is a visible symbol of the ideal aspirations of the American people. It is the one focus in which all unite in reverential devotion. We differ in religion; we differ in politics; we engage in violent dispute as to the true meaning of the Constitution, and even challenge the wisdom of some of its provisions; we inject self-interest and cupidity into most of the ordinary transactions of daily life; but through the sanctifying folds of the flag, the collective intelligence of the nation rises superior to the wisdom of its parts, and thus ensures the perpetuity of the Republic.

AFSA believes General MacArthur's words. Again, Mr. Chairman and committee members, we urge your full support of H.J. Res. 79. The American people, especially those in the military, deserve the opportunity to put flag protection into the law. This is an issue that the people deserve to decide for themselves.



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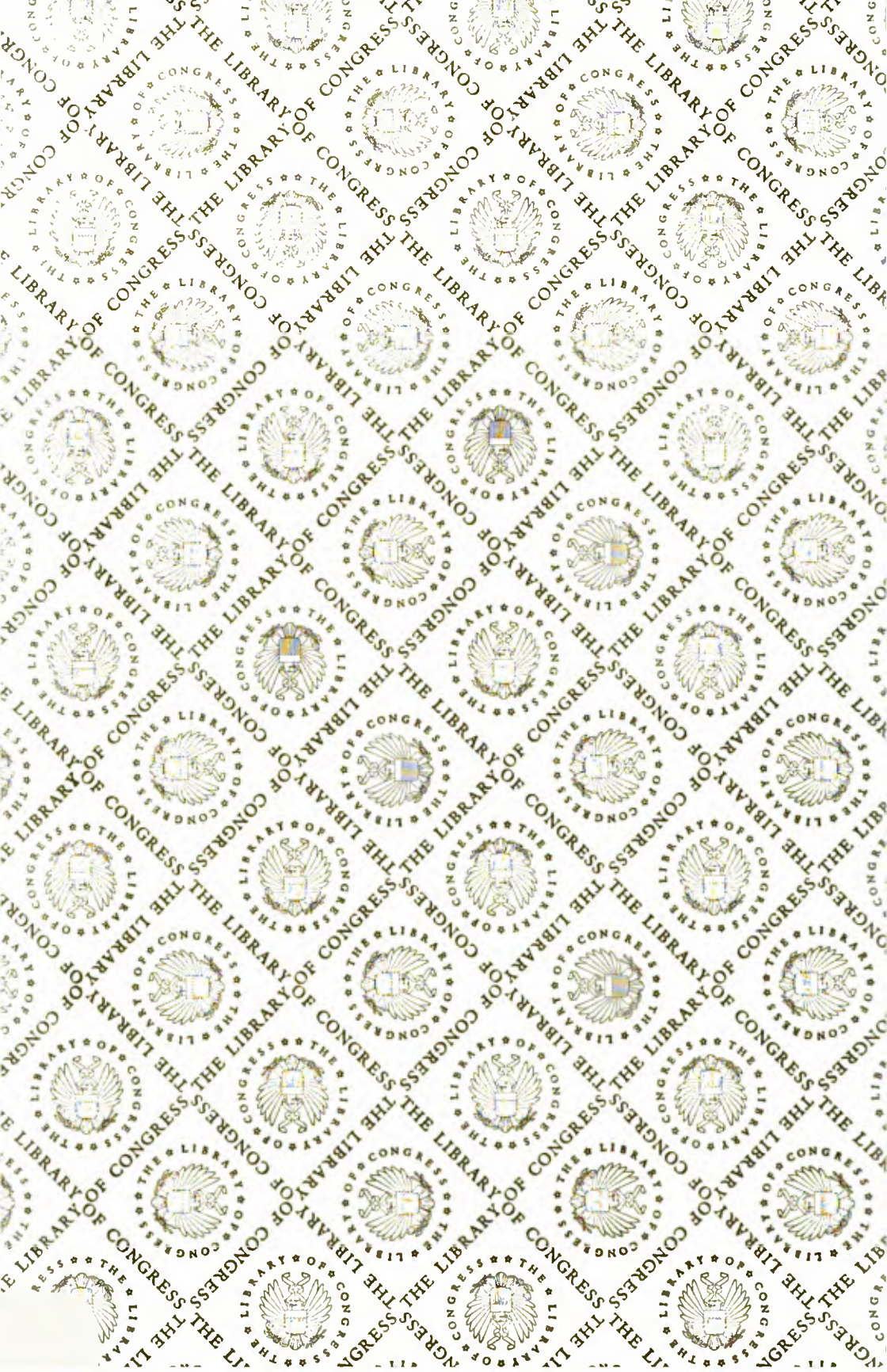
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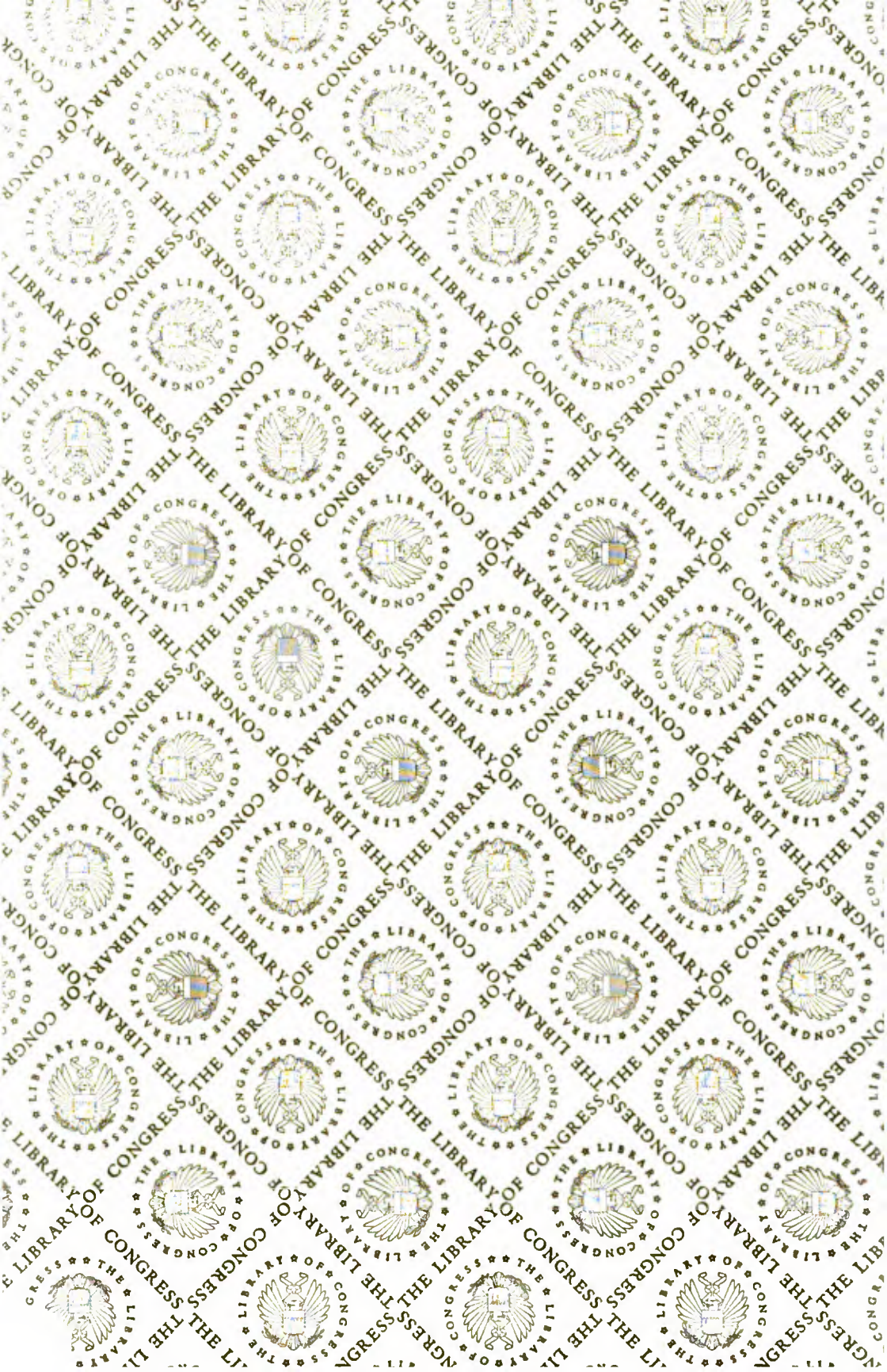
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